U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 August 2003

CASE NO.: 2002-LHC-663

OWCP NO.: 08-119943

IN THE MATTER OF:

LEE SIMMONS

Claimant

v.

COASTAL GREAT SOUTHERN, INC.

Employer

and

LIBERTY MUTUAL INSURANCE CO.

Carrier

APPEARANCES:

HARRY C. ARTHUR, ESQ.

For The Claimant

JOHN C. ELLIOT, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Lee A. Simmons (Claimant) against Coastal Great Southern, Inc. (Employer) and Liberty Mutual Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 4, 2003 in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 25 exhibits, which were received. Employer/Carrier proffered 59 exhibits which were admitted into evidence along with one Joint Exhibit.

Post-hearing, Employer submitted Dr. Likover's deposition exhibits, which were marked for identification at the hearing and are hereby received as EX-43. Claimant submitted Dr. Likover's medical records which were discussed in his deposition but inadvertently excluded as an exhibit. Without opposition, the records are received as CX-31. EX-13, EX-55, EX-66, EX-57, EX-58 are received for the purpose of credibility discussion. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant, Employer/Carrier and Regional Solicitor (Counsel for the District Director) on April 7, 9 and 23, 2003, respectively. Employer/Carrier filed a response to Claimant's post-hearing brief on April 23, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Employer/Carrier filed a Notice of Controversion on August 22, 2001.

2. That an informal conference before the District Director was held on August 27, 2001.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.__; Claimant's Exhibits: CX-__; Employer/Carrier Exhibits: EX-__; and Joint Exhibit: JX-__.

II. ISSUES

The unresolved issues presented by the parties are:

1. Jurisdiction.

2. Causation; fact of injury.

3. The nature and extent of Claimant's disability.

4. Whether Claimant has reached maximum medical improvement.

5. The reasonableness and necessity of recommended surgery.

6. Refusal to submit to medical treatment under Section 7(d).

7. Claimant's average weekly wage.

8. Entitlement to and authorization for medical care and services.

9. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

10. Attorney's fees, penalties and interest. (Tr. 57-58).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on December 10, 1955. He failed to complete high school, "lacking about four credits from graduating."[2] After

[2] Claimant may or may not have obtained a GED. In his deposition, he testified he never tried to obtain a GED because it was unnecessary. (CX-13, p. 26). At the hearing, when he was asked if he obtained a GED while in the Army, he replied, "No. I wasn't in the – I was in the Reserves." (TR. 331). Vocational expert Quintanilla reported Claimant did not receive a GED. (CX-3, p. 3). Vocational expert Stanfill reported no GED, but noted Claimant obtained "an 11th-grade formal education and technical training . . . ." (CX-5, pp. 4, 7). Claimant's testimony at two depositions and a hearing in his previous claim indicates he

he quit school, Claimant moved to Houston, Texas, where he became a "level one technician in auto mechanics" after studying at a local technical college. He worked as a diesel mechanic and truck driver for Lone Star Industry. He fabricated truck and trailer bodies for "Southwest Truck Rigging" and "Truck and Pickup." He drove an "18-wheeler" for Southwest Texas Oil Recovery. (Tr. 187-192, 333).

Claimant joined ILA Local Union 28 in 1991, when he began working as a maintenance and repair (M&R) mechanic for Atlantic Technical Service (ATS) which was located at the Barbour's Cut terminal. On October 21, 1994, he sustained a work-related injury to his back and lower cervical spine when he "stepped off [a] platform and came down on my feet. I just jammed everything." Although Claimant's treating physician at the time explained nothing was wrong with him, Claimant was told by a "spine specialist," Dr. Scarpino, that he sustained an "axial compression load injury." Claimant received epidural injections for symptoms of pain, which was alleviated "for a while" after the 1994 job injury. (Tr. 192-194).

Following the 1994 job injury, Claimant returned to work during "sometime in '99 or the later part of '98." He worked as a maintenance man performing construction work for "Anna Dupris Terrace" for approximately eleven months. He returned to work performing maintenance and repairs for "Flanagan." On July 28, 1999, he obtained full-time employment as an M&R mechanic with Employer.[3] He suffered ongoing physical problems related to his 1994 injury, including back pain for which he was taking medication prescribed by Dr. Uribe. He was able to perform his job and showed up "pretty much every day." He remained with Employer until his April 2001 job injury. (Tr. 193-197, 221, 223). He estimated he would sometimes work seven days per week three or four times per year. (Tr. 342).

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received a GED while working for the Army in 1974. (EX-55, pp. 226; EX-57, p. 14; EX-58, p. 58). A vocational expert in that matter reported Claimant obtained his GED while serving in the "United States National Guard." (EX-60, p. 2). A psychologist in that matter reported no military experience and indicated Claimant "dropped out of high school but went on to get his GED. He has attended college, primarily trade school. He is currently studying for his Master's degree in theology." (EX-67, p. 2).

[3] Thirty days after he began working with Employer, Claimant briefly worked for Flanagan, but returned to regular work with Employer until his April 2001 injury. (Tr. 193).

On April 18, 2001, Claimant testified he was injured on the job when he was surprised by a water moccasin snake while laying on a creeper working beneath a chassis.[4] Fearful of the snake, he rolled away on his creeper which became lodged on a rock. He pushed against the chassis to dislodge the creeper from the rock. The creeper "broke free" and Claimant struck the "back part of the top of [his] head" on a "slack adjuster."[5] Claimant cannot recall what happened for approximately two hours after his accident. (Tr. 197-199).

When he "finally came to [his] senses," Claimant "walked to the front" of Employer's yard and reported the injury to co-workers Mike Conroy and Kevin Washington. He did not report the injury to his supervisor, Calvin Gordon, who "wasn't at the yard. He was at the port somewhere." On the morning of April 19, 2001, Claimant called Mr. Gordon and reported suffering from a terrible migraine headache after he bumped his head on a slack adjuster. Claimant informed Mr. Gordon he was unable to work.[6] Mr. Gordon did not instruct Claimant to seek medical treatment or undergo a urinalysis. Claimant took Tylenol which only reduced his ongoing pain.[7] He missed three days of work after the injury. (Tr. 199-200, 204, 209).

On April 24, 2001, Claimant returned to work with the help of pain medication. Claimant "had a lot of tension around my eyes." On the following day, Claimant's condition at work worsened until he "started having problems focusing, like seeing numbers on the side of the chassis and whatnot." (Tr. 201-202).

Mr. Gordon approached Claimant and directed him to seek medical treatment. Mr. Gordon informed Claimant that Employer would consider a leave of absence. Claimant, who noted Employer is "supposed to give you a ticket [accident report] right then" when

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[4] On July 3, 2002, Claimant submitted to this office an *ex parte* letter in which he explained the snake was "the size of a baseball and about six feet long." (EX-8, p. 2).

[5] Mr. Bobby Holden described a slack adjuster as a piece of equipment used to adjust the distance between brake shoes and brake drums. (EX-18, pp. 58-59).

[6] At his August 13, 2002 deposition, Claimant indicated he reported his injury to Mr. Gordon on the date it happened. (EX-13, p. 61).

[7] Claimant later testified his wife provided "Tylenol, Vicodans and whatever." (Tr. 293).

employees report injuries, responded, "I don't want a ticket because of the changes that they sent [sic] you through. I said I can go get this checked and try to come back to work." Thereafter, Claimant and his wife attempted to secure medical benefits through West Gulf Maritime Association, which denied his claim because he reported sustaining an on-the-job injury. (Tr. 202-204).

Claimant treated with Dr. Rittenhouse for complaints of headache on May 3, 2001. Dr. Rittenhouse was selected by Claimant from West Gulf's list of approved physicians. Claimant erroneously reported an April 23, 2001 date of injury to the doctor because he did not review his work record. Dr. Rittenhouse prescribed pain medications which merely diminished the pain. Claimant treated with Dr. Griver, who recommended physical therapy that was later denied by Claimant's private carrier. He treated with Dr. Uribe, who referred him to Dr. Berrios. Dr. Berrios diagnosed sleep apnea and a sleep-related breathing disorder. Dr. Berrios prescribed Claimant a "sleep apnea machine," which regularly dispenses oxygen during sleep. The machine helped alleviate Claimant's headaches.[8] (Tr. 208-211).

Claimant last treated with Dr. Griver, who advised Claimant against returning to his prior occupation. Dr. Griver opined Claimant reached maximum medical improvement on December 16, 2002. Claimant has not returned to longshore work because he "wouldn't want to chance it;" however, he offered to oversee a friend's construction project and attended "computer school" two or three months before the hearing. (Tr. 212-214, 223).

Claimant explained his former job required him to repair chassis and inspect brakes and electrical systems on trucks. He was required to change tires, which involved carrying a thirty-five to forty-pound jack that is not equipped with wheels. Properly placing the jack beneath a chassis involved placing supporting material beneath the jack to prevent it from sinking into the ground. (Tr. 214-216).

To remove wheels, Claimant used impact wrenches, including a forty-five or fifty-pound one-inch impact wrench which "Jeff" bought and placed on a service truck.[9] Changing tires is a process

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[8] In his August 13, 2002 deposition, Claimant testified his headaches stopped with the use of the machine prescribed for his sleep apnea. (EX-13, p. 71).

[9] Claimant was ostensibly referring to Jeff Lawrence, who was Mr. Gordon's supervisor according to Mr. Gordon and Mr. Holden. (Tr. 126-127; EX-18, p. 50).

often handled by one person because there is no time to wait for another person to travel across the yard for help.[10] He has changed as many as twenty tires per day. (Tr. 216-219).

Claimant was required to install dolly legs, which weighed approximately 125 to 150 pounds, onto containers. (Tr. 219). He was periodically required to perform maintenance on a container floor if "it only needed one small piece of board or something like that" or if the floor needed to be secured when screws became loose or boards became swollen. He indicated it was rare to replace floors of containers. (Tr. 231). The containers and chassis belonging to Hyundai, Employer's client which was "very particular about their stuff," were better maintained than the containers and chassis repaired by Claimant for his former employers. (Tr. 232-233).

Claimant periodically drove a yard hustler to the port to retrieve chassis and containers for the purpose of repairing them at Employer's facility. He did not normally repair containers or chassis at the port; however, he occasionally performed some minor maintenance and repairs, including tire repairs, on chassis and containers to trailer them back to Employer's facility for the completion of repairs and maintenance. (Tr. 223-227). Employer periodically required containers to be towed from its facility to the port. Claimant estimated he towed containers from Employer's facility to the port "more than a dozen" times over two years. (Tr. 229-230).

Claimant never boarded a vessel to provide maintenance or repairs. He "moved cargo to the ship," but noted "they got [sic] special people to take stuff on and off the ship." However, he used Employer's yard hustler to help crane operators who directed him to drive cargo beneath a crane "many times." (Tr. 227-230; 337-338).

Claimant estimated the distance from Employer's facility to the port was about two or three miles by road. However, the distance was "about a mile and a half or two miles" using a path over a neighbor's yard. Claimant used the shorter path because Employer's yard hustler was not "highway ready," which precluded his use of the "main road." He noted Employer's yard was separated from the water by a neighbor's yard and by a railroad track. (Tr. 225, 336-337; EX-13, p. 28).

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[10] According to an "affidavit" signed by Calvin Gordon, T.M. Conroy, and K.T. Washington, Claimant "often works in remote areas alone." (EX-17).

Claimant denied Mr. Gordon performed the same work Claimant completed; rather, Mr. Gordon worked in a supervisory capacity and spent much of his time in an office or at the port. According to Claimant, Mr. Gordon was familiar with changing tires and offered untruthful testimony about the exertional level of Claimant's job when he testified he could perform Claimant's work without heavy lifting. (Tr. 222-223).

Claimant noted there are many job opportunities for M&R mechanics because they are "always" needed. He would return to his job as an M&R mechanic if he could. He explained he is limited from returning to his prior work because of his age and back and cervical conditions, which cause pain while reaching and grabbing. He could return to work driving commercial trucks; however, he would be limited from positions requiring heavy lifting or dragging. He believed he could supervise construction jobs because of his experience in that industry and his ability to read blueprints. (Tr. 234-239).

Claimant acknowledged the July 2001 written statement of events, which was signed by his co-workers and Mr. Gordon. He explained the other employees were incorrect about the facts regarding his Austin trip, which was unrelated to the F.B.I. Rather, he traveled to Austin in March 2001 to meet an attorney named "Bledsoe" regarding "somebody forging my name."[11] (Tr. 246-251; EX-17; CX-22).

Claimant admitted having an appointment on May 1, 2001, but denied it was a doctor's appointment. He denied undergoing a "brain scan" on May 1, 2001. He admitted discussing brain tumors with Mr. Gordon. He and his wife studied headaches in "something like a health food book," which indicated headaches may be "from your eyes, your nose, your throat, your ears. And I'm saying the teeth. A number of things. [sic]." According to the book, tumors could also cause headaches. (Tr. 251-253; EX-17).

Claimant admitted Mr. Gordon gave him a leave of absence to undergo a medical evaluation before returning to work. He acknowledged reporting "he hit his head on a brake slack adjustor and broke the adjustor in half." He "couldn't believe" his alleged head injury would cause the duration and severity of his headaches. Claimant admitted telling Mr. Gordon about swollen blood vessels and headaches related to prior dental surgery which might form the basis of a medical malpractice lawsuit. He admitted seeing a co-

[11] At his deposition, Claimant indicated he visited the F.B.I. in Houston, Texas to obtain a handwriting analysis on the fraudulently signed document. (EX-13, p. 40).

worker, "Mike Conroy," while applying for off-the-job injury compensation; however, he indicated he reported to the carrier that his injury was work-related.[12] He admitted seeking an accident report from Mr. Gordon, who refused to provide a report. (Tr. 254-263; EX-17; CX-4).

On cross-examination, Claimant testified Mr. Gordon, Mr. Conroy, and Mr. Washington knew his job injury occurred on April 18, 2001. However, the other employees conspired against Claimant and lied about events surrounding the injury because Claimant would not agree to let Mr. Washington use his work truck.[13] Although Claimant believed the other employees were liars, he conceded they were factually correct at times. He agreed he reported suffering from tumors and swollen blood vessels; however, he denied reporting his swollen blood vessels were related to prior dental work.[14] Prior to his job injury, Claimant admitted suffering pain from a dental plate which he refused to wear due to pain. (Tr. 264-274).

Claimant admitted consistently reporting a job injury on April 23, 2001 to his physicians, attorneys and DOL. (Tr. 268, 300; EX-1). He failed to report a work-related accident to Dr. Rittenhouse until May 15, 2001, when he reported an April 23, 2001 injury. (Tr. 277-279). Claimant admitted he began claiming his job injury

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[12] Claimant filed two benefits applications with the Maritime Association on May 1 and 11, 2001, respectively. He alternatively identified "April 2001" and "May 3, 2001" as the date of injury, which he indicated was work-related. (CX-4).

[13] In his July 3, 2002 *ex parte* letter, Claimant identified Mr. Gordon, Mr. Conroy, and Mr. Washington as "three union members [who] conspire against [me] to conceal [and] suppress evidence." (EX-8, p. 2). At his August 13, 2002 deposition, Claimant testified Mr. Gordon hired Mr. Washington, who was one of Mr. Gordon's "buddies." Mr. Gordon directed Claimant to "give [Mr. Washington] my work truck." Claimant refused to allow Mr. Washington to use the truck because of the inconvenience it would cause and because he had greater seniority than Mr. Washington. He concluded, "that's when all this different conflict started happening." (EX-13, pp. 96-97). At the hearing, Claimant confirmed a dispute arose over the truck because "I wouldn't turn it loose." (Tr. 343).

[14] Dr. Rittenhouse indicated Claimant reported suffering from migraines related to bilateral root canals and upper and lower molars on May 9, 2001. (EX-32, pp. 6-7). Claimant admitted reporting dental work to the doctor, but denied reporting headaches related to dental work. (Tr. 271-273).

occurred on April 18, 2001 after he requested an employment report from the West Gulf Maritime Association indicating dates on which he worked. (Tr. 300).

Claimant testified his use of medications prescribed by Dr. Uribe caused him to incorrectly identify the date of injury as April 23, 2001. Although Dr. Uribe's records indicate Claimant did not visit his office until January 2002, Claimant testified Dr. Uribe's records were incomplete due to clerical confusion because he and his son, who also treats with Dr. Uribe, share the same name. Claimant acknowledged the accuracy of Dr. Rittenhouse's medical records which indicate he initially treated with Dr. Rittenhouse on May 9, 2001. He could not recall whether Dr. Rittenhouse prescribed medication. (Tr. 292-301).

With medication, Claimant continued working through the rest of the day on April 18, 2001.[15] (Tr. 282). Claimant admitted Employer maintains a policy of reporting injuries immediately to facilitate timely drug testing. Claimant never underwent drug testing following his April 2001 injury. (Tr. 289).

Claimant admitted other workers were present at work on the day of the accident, but none of them witnessed the accident as it occurred. Claimant explained he was in a remote part of Employer's yard, away from other workers when he sustained his injury. (Tr. 281).

Contrary to his earlier hearing testimony, Claimant testified he reported his job injury to Mr. Gordon on April 18, 2001. He explained that he "briefly" discussed the injury with Mr. Gordon late in the evening on April 18, 2001, when Mr. Gordon returned from the port as Claimant was departing work. He added, "I just told him I'll talk with him in the morning. I didn't set [sic] down and really explained [sic] to him what happened."[16] On April 19, 2001, Claimant called Mr. Gordon to report his injury because

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[15] At his August 2002 deposition, Claimant testified he continued working for the rest of the day "[b]ut I asked them for stuff for headache; bad headache." (EX-13, pp. 38-39). Claimant did not identify the individuals from whom he requested headache medication.

[16] In his July 3, 2002 letter, Claimant reported notifying Mr. Gordon of his injury when it occurred on April 18, 2001. At the time he drafted the letter, Claimant's recollection of events was distorted because he was on "real heavy" prescription pain medication. (Tr. 286-287; EX-8, pp. 1-2).

he was unable to work. On April 24, 2001, Claimant again notified Mr. Gordon of his injury when he returned to work. (Tr. 282-288).

On April 18, 2001, when he described the circumstances of his injury to his co-workers and his wife, Claimant failed to mention the specific date of injury. However, he showed his wife and co-workers "a knot on the top **front** side of my head."[17] (Tr. 291, 303). Claimant believes he and his wife confused the date of his injury because they did not refer to a calendar on April 18, 2001. Consequently, when his wife completed benefits applications on his behalf, she erroneously entered "April 2001" and "May 3, 2001" as dates of injury. (Tr. 301-308; CX-4).

Claimant returned to Employer's yard to "check on my tools and my tool box." He estimated his tools were worth over $7,000.00, and he "had one of the employees safeguard my tools in a container because they was [sic] on the back of my truck."[18] (Tr. 322).

Claimant admitted seeking medical treatment with several doctors, including Drs. Liu, Scarpino, Pennington, Beaver, and Alianell, for prior injuries with other employers, despite his answer on an interrogatory that he did not treat with any physician or hospital prior to or subsequent to the date of the instant injury. After his previous job injury with ATS,[19] Claimant was restricted from lifting more than twenty pounds by Dr. Scarpino. Nevertheless, he returned to work as an M&R mechanic for Flanagan and Employer. He admitted his vision diminished after 1994. (Tr.

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[17] At his August 13, 2002, deposition, Claimant testified he injured the "center **back** part" of his head and failed to describe any knot or bruise on his head. (EX-13, pp. 38). As noted above, Claimant's earlier hearing testimony indicates he struck the "**back** part of the top of [his] head." (Tr. 197-199). Claimant reported to Dr. Griver that he injured the center **right** side of his head. (EX-27, p. 3). Claimant reported to Dr. Likover that he injured the center **left** side of his head. (EX-31, p. 1).

[18] At his August 2002 deposition, Claimant stated he personally owns the tools, which he arranged to be placed into a container at Employer's facility in case his doctor releases him to return to work. He planned on returning to work with Employer if his doctor provided a release. (EX-13, p. 63).

[19] The previous injury resulted in the filing of a claim which was settled after proceeding to a formal hearing on December 17, 1996. (Tr. 318; EX-55).

314-320; EX-12, p. 3). Had Claimant become dissatisfied with Employer, he could have returned to work "anywhere on the waterfront doing M&R work and work [sic]." He could have returned to work with Flanagan making the "same" amount of money under superior working conditions. (Tr. 339-340).

After his April 2001 injury with Employer, Claimant helped a friend build barbecue pits for which he guessed he was paid $1,000.00. He earned $1,200.00 performing car repairs for friends. He could perform electrical and plumbing maintenance, but would need training to perform according to city codes. He can perform mechanical repairs to household and automotive air conditioning compressors. He received education in using computers which he owns and continues to use since his August 2002 deposition. He is familiar with carpentry and worked as a maintenance electrician helper. He is experienced as a diesel mechanic and truck driver and currently possesses a commercial driving license. He is familiar with building trucks "from the frame up." He is a pastor of a church and plays various musical instruments.[20] (Tr. 324-326; CX-2).

Claimant admitted failing to report any back complaints related to the instant injury until June 27, 2002, when he reported complaints of back pain to Dr. Griver, with whom he treated since October 25, 2001. He attributed the latent appearance of his back complaints to pain medications which masked his symptoms after his injury. (Tr. 321).

Calvin Gordon

Mr. Gordon works for Employer through the ILA Local Union 28, a union of maintenance and repair mechanics (M&R mechanics). He is a "walking foreman" who oversees maintenance and repair of chassis

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[20] At his deposition, Claimant failed to indicate he was a church pastor. He testified a typical day involves doing "nothing." He visits friends or accompanies his wife to retrieve their children from school. He added, "When I'm not going to the doctor, I sit down and read my Bible and pray and stuff like that. I go by the church, holler at some of the people there." (EX-13, p. 53). During a deposition in his previous claim, Claimant explained he performed various functions for churches which paid him through occasional donations received from intermittent "love offerings." (EX-58, pp. 122-124). Dr. Rios reported Claimant "has been a Pentecostal minister for approximately fifteen years" upon evaluation in the prior claim. (EX-67, p. 2).

and containers. He was one of Employer's first employees in 1998 and recommended hiring Claimant with whom he was familiar since 1991. (Tr. 94-96, 129).

According to Mr. Gordon, Employer's facility is located in Barbour's Cut, an area of property which is divided among private owners and the Port of Houston. Mr. Gordon is unaware of vacant space for lease at the Port of Houston. He does not know of vacant land located nearer to Barbour's Cut Terminal than Employer's property. (Tr. 97-99).

Mr. Gordon testified there are several operations similar to Employer's in Barbour's Cut: "Flanagan," "P&O," "SeaLand Maersk Shippers," and "Barbour's Cut." The local companies provide "three different phases" of services: (1) maintenance and repairs, (2) stevedoring, and (3) clerks and checkers. (Tr. 99-100).

Mr. Gordon indicated Employer handles maintenance and repairs of chassis and containers that are delivered to Employer's yard by a third-party driver who retrieves the broken equipment from the port. The equipment is delivered over the road by tractor. If a chassis breaks down before it picks up a load, Employer, which does not work at the port facility, may dispatch an employee to the port to "fix the flat tire or whatever." The other companies, which are "custom bonded" on port property, provide the additional service of stevedoring, or "handling loads."[21] (Tr. 100-102).

Employer provides all repairs on chassis, but performs only minor repairs to containers. Major container repairs, which are classified as anything costing above $150.00 to repair, are sub-contracted to a third-party, "Global." Removing and replacing a container's floor is a major job, as is replacing a corner-post. Repair a hole in a container involves a "fairly small plate of metal." (Tr. 130, 371-372). Employer primarily performs chassis work. (Tr. 375).

According to Mr. Gordon, Employer works with refrigerated units, but has nothing to do with loading and unloading them. Employer only ensures that the units are plugged in. Other companies unload refrigerated units and load them onto a chassis for transportation to a plug-in location, where Employer is responsible for plugging the units in and monitoring them. Once the units are unplugged, stevedores are responsible for retrieving

[21] Mr. Gordon noted all yards which are not on port property are not custom bonded, which precludes them from "handling loads." Employer's property is not on port property and by inference is not custom bonded. (Tr. 99).

the units, loading them onto ships, and maintaining their performance. Thomas Fowler is Employer's mechanic responsible for servicing refrigerated units. (Tr. 102-106).

Mr. Gordon explained stevedores are responsible for repairing damaged tires and malfunctioning chassis beneath cranes loading and unloading cargo. Employer is responsible for a chassis while it is empty. Once a chassis is loaded, Employer has "nothing more to do with it." However, if a tire is damaged or low at "the pads," which is an area where loaded chassis await departure from the port, third-party truckers may haul the loaded chassis to Employer's yard, where the tire is inflated by Employer's employees. Once or twice per month, Employer's employees may be dispatched to repair the tire on location if a tire is flat at the pads. (Tr. 107-110).

Mr. Gordon noted that, if there is "major damage" to a chassis on the pads, the chassis is not allowed to depart from port property. Cargo on damaged chassis is off-loaded to a properly functioning chassis. The empty chassis is generally transported from the port to Employer's facility by third-party drivers. Employer occasionally dispatches its own employees to retrieve or deliver containers or chassis "once or twice per month," when employees use a mule or yard hustler to transport the equipment. Claimant delivered containers or chassis to the port "every once in a while." (Tr. 110-111).

According to Mr. Gordon, M&R mechanics at Employer's facility are required to change tires and wheels, service brakes and replace "landing gear," or support posts. Mr. Gordon, who is 52 years old, personally performs the necessary work "just as much as anybody else" employed by Employer. (Tr. 111-112, 117-118). Before April 2001, Mr. Gordon never noticed Claimant experiencing any difficulties performing his job. (Tr. 131).

Mr. Gordon testified that repairing or placing tires and wheels involves removing them from a chassis using a tire hammer, some "bars" and a small impact tool. Employer does not use large impact tools which are necessary for servicing "Bud rims." Employer only services "Daytons," which require smaller impact tools. Large impact tools may weigh 38 pounds while small impact tools weigh from five to seven pounds. (Tr. 116-117). He noted Employer has no one-inch impact guns. (Tr. 373-374).

Mr. Gordon explained mechanics never lift tires and wheels which may weigh 190 pounds and fifty pounds, respectively. They are always rolled to a necessary location. Service trucks, which are used to transport the tires and wheels, have low bumpers which

allow tires and wheels to be easily rolled onto and off of the trucks. (Tr. 112-116). Removing wheels off a hub involves minimally jacking a wheel "just to get it off the ground." A greased mud flap is laid beneath the tire to reduce any friction, which allows the tire and hub assembly to be easily removed from the axle. Replacing the tire involves the same process in which an employee "slide[s] it right back on."[22] (Tr. 372-373).

Mr. Gordon indicated Employer has no creepers because "you can't use a creeper in [Employer's] yard. A creeper would not work."[23] He noted that a tire bar weighs five to six pounds while a grease gun weighs less than five pounds. Sledge hammers may weigh ten or twenty pounds. Brake shoes on a truck weigh about ten pounds. Cross bars weigh about eight pounds. Cutting torches are "not really weighable [sic] because they're attached to a hose." Electrical components are "obviously light," requiring the use of small hand-tools such as a screwdriver and socket attachment. (Tr. 373-374).

Mr. Gordon indicated employees are expected to bill eleven hours per eight-hour day which is "very easy" to accomplish. Workers may work together, or "gang-bang," on one task which may be billed by both workers. (Tr. 119-120). Through the use of that process, eleven hours may be billed by as early as 3:00 p.m. (Tr. 374-375).

On April 18, 2001, Mr. Gordon recalled being told by Claimant that Claimant would be unable to work the following day because he was traveling to Austin to help the Federal Bureau of Investigation investigate a fraudulently filed bankruptcy in Claimant's name.[24]

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[22] Claimant offered a similar description of removing and replacing wheels in his October 11, 1996 deposition, which was submitted in an earlier claim against a former employer. There, he noted the procedure was "One pop, right. That is what they call a quick way of doing it." By using mud flaps and grease, a mechanic may remove a tire by keeping it on the ground and "you can slide it easier." (EX-57, pp. 68-71).

[23] At his August 13, 2002 deposition, Claimant testified he "ordered a special creeper" with three-inch wheels to accommodate dirt and rocks in the environment where he worked. (EX-13, p. 38). Claimant did not mention a modified creeper at the hearing.

[24] Claimant denied traveling to Austin during April 2001. He completed the Austin trip in March 2001. He submitted a "visitor register," which indicates he and a friend signed-in at the Texas State Teachers' Association Building to visit an

Claimant returned several days later and reported headaches for which he would seek medical treatment. Claimant took off the rest of the day. He returned the following day and reported that he was suffering from brain tumors for which he would need a CAT scan. Several days later, he reported he did not suffer from tumors; however, he was experiencing headaches from swollen blood vessels in his head related to dental surgery. (Tr. 121-125; 135-144).

Mr. Gordon, who noted he is responsible for reporting job injuries to Employer, testified he was never told of an incident involving Claimant and a snake until Claimant's counsel contacted him by telephone.[25] Claimant failed to report any work-related injury to Mr. Gordon. Approximately one week after Claimant reported tumors and swollen blood vessels, he requested a job-accident report from Mr. Gordon; however, Mr. Gordon denied the request because Claimant originally reported his symptoms were not work-related. (Tr. 121-126).

On cross-examination, Mr. Gordon indicated he was familiar with Claimant's reputation among union members. Claimant was well-known among union members as "Lying Ass" or "L.A." Simmons because "he's always exaggerating about things that he's got and what he ain't got and everything like that." The nickname was derived from Claimant's first initials, "L. A." (Tr. 143).

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attorney in Austin, Texas on March 27, 2001. (Tr. 205-207, 248-250; CX-22). At his deposition, Claimant indicated he traveled to Austin to meet with an attorney because he was directed by a man with the F.B.I. to seek legal counsel related to a fraudulent Chapter 13 filing; however, he later stated he was directed to find the attorney by a "real estate lady." The F.B.I. was involved only insofar as Claimant visited the Houston office for a handwriting analysis to prove the Chapter 13 paperwork was fraudulent. Claimant could not provide a copy of the paperwork related to the alleged Chapter 13 filing because "[i]t got taken when they came in my house. They took my stuff." He did not identify who entered his home and removed his documents. (EX-13, pp. 40-42).

[25] Mr. Gordon did not state when Claimant's counsel reached him; however, it is noted that Counsel for Claimant is Claimant's third attorney whose services were requested after Claimant's first two attorneys "dropped the case." (Tr. 285). By inference, Claimant's attorney contacted Mr. Gordon at some point after the claim was filed and after the other attorneys were no longer involved with the matter.

Mr. Gordon acknowledged a written statement he helped Jeff Lawrence prepare with Mike Conroy and Kevin Washington on July 23, 2001. (Tr. 131-135; EX-17). He noted the written statement accurately reported circumstances surrounding Claimant's alleged injury. He recalled Claimant left work on April 17, 2001 to assist his wife with an automotive problem. He returned to work on the following day, when he performed his job without incident and physically appeared normal. Claimant and his co-workers reported no accident on April 18, 2001; however, Claimant mentioned he would travel to Austin to "take care of a [false bankruptcy filing] through the FBI." Claimant did not work on April 19, 20, 21, 22, or 23, 2001. Claimant returned to work on April 24, 2001, when he reported no injury. After Claimant returned to work, Claimant told Mr. Gordon that Claimant's case "might be called back up because he was interviewed by the FBI." (Tr. 135-140; EX-54, p. 36).

According to Mr. Gordon, the July 23, 2001 written statement accurately reported Claimant's request for a work-related accident report was denied by Mr. Gordon shortly after Claimant was observed at the union hall seeking compensation for an "off-the-job injury." Claimant was denied a work-accident report because he "was going to file a non-accident claim, and suddenly it become [sic] an accident claim." Moreover, Claimant previously reported "he had brain tumors and I never thought brain tumors were related to any kind of accident." Likewise, Claimant reported that his problems were related to his prior dental surgery. (Tr. 144-147).

Mr. Gordon testified Employer maintains a strict policy of instantly and immediately reporting job injuries which allows employees transportation to an occupational clinic for free evaluation and prompt emergency treatment if necessary. Mandatory drug screening accompanies the procedure. Because Claimant failed to report a job injury until May 2, 2001, he did not undergo drug screening. (Tr. 147-148, 157-160).

Mr. Gordon acknowledged his signature on a typed description of Claimant's job with Employer. He testified the job description, which is undated, was prepared after Claimant's alleged injury. He indicated the job description accurately noted Claimant was a "yard mechanic" at Employer's "container storage area." Claimant was not required to leave the yard, where he was only required to work with small hand-held tools. Claimant primarily performed minor repairs to containers and trailers, "such as replacing tires, brakes, cross-braces, landing legs, and tail lights." Claimant did not work on "tractor trucks that pulled the containers and trailers." He infrequently lifted no more than twenty pounds. (Tr. 149-151; EX-47). Mr. Gordon noted employees work "probably two weekends" on an average year. (Tr. 140).

On re-direct examination, Mr. Gordon testified he could not recall when Claimant lied to him, despite the "L.A." moniker. (Tr. 155). However, Claimant represented to Mr. Gordon that he was in the Army, which was later disputed by Mr. Gordon's friend.[26] (Tr. 120, 375-376). Mr. Gordon admitted Employer was neither hiring nor anticipating hiring anytime soon. Thus, if someone recovered from a disabling job injury, they could not return to Employer because Employer has no openings at the present. (Tr. 377-378).

Richard Mangum

Mr. Mangum is a longshoreman and a member of ILA Local Unions 28, 24 and 20. He has worked as an M&R mechanic for various employers, other than Employer, and is currently working as a truck driver for Flanagan. (Tr. 162-163, 176).

Mr. Mangum worked with Claimant and Mr. Gordon for ATS before Claimant worked with Employer. There, M&R mechanics were expected to "do tires, change out dolly legs and repair a container [and] the corner posts on a container." The mechanics were also expected to replace damaged container floors, repair lights, perform "brake jobs" and possibly change valves. The work involved lifting over twenty pounds. (Tr 163-164).

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[26] Claimant testified he was not in the Army, but "was in the Reserves." (Tr. 331). At his deposition, he stated he was never in the military, but served in the National Guard. He received an honorable discharge without "[seeing] any action or anything." (EX-13, pp. 102-103). Vocational expert Stanfill reported Claimant "did not serve in the United States Armed Forces;" however, vocational expert Quintanilla reported Claimant "served in the National Guard with honorable discharge." (CX-3, p. 3; CX-5, p. 4).

In a previous claim, Claimant testified he served in the Army after leaving high school. While in the Army, Claimant served in Cambodia, but "was not stationed there." He remained in the Army until approximately "the latter part" of 1975. (EX-55, pp. 226-229). Elsewhere in that matter, Claimant testified he was in the military from 1973 through 1981, but later indicated he left the military in 1977 or 1978. After basic training and Advanced Individual Training, Claimant returned to Houston, where he was a National Guardsman. He "went to the coast of Saigon," where he was in a battle unit in "the latter part of '75, the beginning of '76." He could not recall his military identification number. (EX-57, pp. 14-20, 28; EX-58, p. 58).

With other employers, working on dolly legs was a one-mechanic job which involved lifting around one hundred pounds and using an impact wrench at various heights. Working on corner posts involved using a torch to cut and remove damaged posts which weigh two hundred pounds. Mechanics were expected to drag new posts onto and off of service trucks to replace damaged posts. Replacing damaged floors entailed cutting and prying oak floors from containers. The floors generally measured four feet wide by eight feet long, were about one and a half inches thick and weighed at least 180 pounds. (Tr. 164-166).

Tires were changed around five or six times per day. Changing tires included laying 190-pound tires flat on the ground and standing them up to roll them to different locations. Standing the tires up and moving them around required lifting around ninety pounds. To complete the job, mechanics also used hammers, which weighed twelve to fourteen pounds, to beat the tires from wheels. Replacing tires was generally performed by one person. Repairing brakes required mechanics to remove and replace two 190-pound tires. To complete the task, mechanics needed to use jacks which weighed as much as one hundred pounds. (Tr. 166-170).

For the other employers, Mr. Mangum explained that M&R mechanics were required to perform a service call at the loading and unloading area of the port "very seldom," or "once or twice [per] week." If trucks remained operable, they were brought from the port to an employer's yard for repair. (Tr. 170-171).

Mr. Mangum disputed Mr. Gordon's description of Claimant's job, which involved infrequently lifting up to twenty pounds while completing only minor repairs to containers and trailers using small hand-held tools. He testified M&R mechanics repaired heavy damage and lifted heavy material which was a "young man's job." He noted more than eight hours of work by an individual must have been logged during each day. Mechanics could not log their hours for time spent assisting other mechanics on a task. (Tr. 172-173).

Mr. Mangum testified a walking foreman must interview and order a urinalysis from an employee complaining of an injury, which is reported in writing by providing a "ticket" to the foreman's supervisor. Failure to order the urinalysis and complete the paperwork results in discipline for a walking foreman. (Tr. 173-174).

On cross-examination, Mr. Mangum admitted he has never worked for Employer. His job descriptions of M&R mechanics were based entirely on his experience with other employers. He had no knowledge of Claimant's job description with Employer, nor was he

aware of Claimant's pain or ability to complete his job while working with Employer. He worked with Claimant in 1995, when Claimant was "a great worker." He was aware Claimant sustained an injury in 1994, but was unaware of work restrictions associated with that accident. He agreed that job descriptions with employers may vary among mechanics according to areas of mechanics' skills or proficiencies. (Tr. 176-182; 185).

Jessica Lelivelt

Ms. Lelivelt is Carrier's claims adjustor and case manager who was assigned to Claimant's case. Carrier received notice of the claim by a facsimile of Claimant's LS-203 which was sent by employer on or around July 24, 2001. (Tr. 346-347).

On July 30, 2001, Ms. Lelivelt interviewed Claimant, who reported an April 23, 2001 date of injury. Although Claimant complained of headaches, he complained of no back problems. Carrier never received supporting medical records which were requested from Claimant at the interview. Carrier disputed coverage because: (1) the reported injury occurred on a date when Claimant was not working; (2) no medical documentation supporting "any kind of claim" was received; (3) there were discrepancies in the claim in general; and (4) Carrier received no information indicating the accident was immediately reported to Employer. (Tr. 347-349, 355).

According to Ms. Lelivelt, no physician requested authorization to refer Claimant to another physician or specialist. She received no request for authorization for medical treatment or physical therapy. She received no medical reports, and is unaware if Carrier ever received a medical bill in this matter. (Tr. 349-350).

On cross-examination, Ms. Lelivelt could not recall when she received Employer's report of injury. She admitted she received no medical reports that Claimant was restricted from returning to work after his injury. Rather, she relied on apparent factual discrepancies surrounding Claimant's injury, other employees' statements that no incident was reported, and the absence of medical information indicating Claimant even sought treatment following an injury. (Tr. 350-354).

Ms. Lelivelt acknowledged dates of injury are sometimes incorrectly reported; however, she indicated employees generally advise of a discrepancy in an interview. When she interviewed Claimant on July 30, 2001, Claimant continued to maintain he was injured on April 23, 2001. Ms. Lelivelt did not specifically ask

Claimant why he was filing a claim for an alleged work-related injury which appeared to occur at a time when he was not working. Rather, she generally asked Claimant when he was injured because she was "already suspicious" of the claim which was not supported by any reports of injury or medical treatment. (Tr. 354-357).

Ms. Lelivelt admitted Claimant's LS-203 indicated Dr. Ralph Rittenhouse was treating Claimant; however, she never received any supporting medical documentation of treatment. Claimant provided no information on whether the injury was reported as a workers' compensation claim to the doctor or whether the doctor contacted Employer. Likewise, Claimant produced no explanation regarding the doctor's failure to contact Carrier. Without more information, Ms. Lelivelt concluded the claim should be denied. (Tr. 357-362).

Ms. Lelivelt denied Carrier would categorically refuse authorization for medical treatment after its original denial of the claim. If she received an authorization request for medical treatment or payment of a medical bill, she would have "absolutely" continued to investigate the claim. If subsequent information would have been submitted which indicated coverage was required, Ms. Lelivelt would have reevaluated her position. (Tr. 363).

William L. Quintanilla

Mr. Quintanilla was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 380-383). At Employer/Carrier's request, he provided a vocational assessment on September 3, 2002 and a labor market survey on January 14, 2003. (Tr. 383; EX-46).

Mr. Quintanilla noted Claimant sustained a back injury in 1994, when he was assigned a 20-pound lifting restriction from two physicians and a "20 to 50-pound" lifting restriction from a physician performing an independent medical evaluation at DOL's request. After Claimant sustained a "bump on the head" in April 2001, his restrictions were unchanged. (Tr. 384-385).

Mr. Quintanilla indicated returning to work is the "best barometer" of whether a person may perform a job within physical restrictions and limitations. He generally relies on sixty-day follow-up evaluations to determine whether individuals who return to work may successfully remain at work within their physical restrictions and limitations. He noted Claimant functioned at his job with Employer after his 1994 injury for "well over a year and a half," which established Claimant could perform his job within his original physical limitations and restrictions. Because Claimant's restrictions were unchanged, Mr. Quintanilla concluded

Claimant should be able to return to his former job at Employer's facility with no diminution of wage-earning ability. (Tr. 385-386).

Alternatively, Mr. Quintanilla prepared a labor market survey in which he identified jobs available to Claimant within his restrictions, including jobs as an auto mechanic paying entry-level salaries ranging from $10.00 to $28.00 per hour. Entry-level, unskilled jobs such as a computer salesperson, noncommissioned security guard and officer paying $8.50 to $9.00 per hour were also available. (Tr. 386-387).

Thus, Mr. Quintanilla concluded Claimant suffered no loss in wage-earning capacity, based on his ability to return to his prior occupation or, alternatively, based on jobs established in his labor market survey. Mr. Quintanilla observed Claimant remained a card-carrying member of his union and could return to work "at any day he chose to do so." He agreed with Claimant's alleged testimony elsewhere that stevedoring jobs are readily available to Claimant because there is a "big need for the type of work that he does." (Tr. 387-389).

On cross-examination, Mr. Quintanilla indicated he considered Claimant's pre-existing back condition and restrictions related to the earlier 1994 injury in his vocational assessment. He noted Claimant's pre-injury restrictions against lifting zero to ten pounds and ten to twenty pounds would eliminate medium jobs from consideration. He admitted Claimant's job description might be considered medium according to the testimony of Claimant and Mr. Mangum. He acknowledged that Mr. Stanfill, whose vocational opinion was requested by Claimant, opined Claimant's job was classified as "medium." (Tr.389-396; CX-5, p. 7). Mr. Quintanilla conceded the $28.00 per hour job he identified as a mechanic would pay an entry-level salary of $18.00 per hour. (Tr. 397-399).

On re-direct examination, Mr. Quintanilla's opinion that Claimant could return to his former occupation was unaffected by Dr. Scarpino's opinion that Claimant should have been restricted from lifting over ten pounds after the 1994 injury. The restriction was similar to the other restrictions assigned after Claimant's earlier injury. Moreover, Claimant successfully functioned at work within his earlier restrictions that were the same as those assigned after the instant injury. (Tr. 399-401).

On re-cross examination, Mr. Quintanilla's opinion that Claimant could return to his prior occupation within his restrictions was unaffected by an orthopedic surgeon's opinion that Claimant sustained no disability after his first injury. He

acknowledged physicians often provide different opinions. He opined such variance in opinions generally supports the conclusion that simply returning to work may be the "best thing" to demonstrate an ability to physically return to a job. (Tr. 401-402).

The Medical Evidence

Dr. Jack W. Pennington, M.D.

On September 14, 1995, Dr. Pennington, who treated Claimant from December 12, 1994 through September 14, 1995 for his October 1994 back injury, concluded Claimant, who completed physical therapy and work-hardening, could return to regular work as a mechanic. He noted there was no objective evidence to indicate a permanent impairment. (EX-65, p. 21).

Dr. Patricia Beaver, M.D.

Dr. Beaver examined and evaluated Claimant in 1995 and 1996 following Claimant's 1994 back injury. On June 30, 1995, she diagnosed degenerative disc disease at L4-5. On July 3, 1996, she provided an OWCP-5 Restriction Evaluation in which she reported Claimant reached maximum medical improvement on September 14, 1995. She assigned Claimant a 20 to 50 pound lifting restriction and indicated Claimant was capable of intermittent sitting, walking, standing and lifting within his lifting restriction for eight hours per day. Claimant was capable of intermittent bending, squatting, climbing and kneeling for one hour per day, while he could intermittently twist up to four hours per day. Otherwise, he was unrestricted. (EX-68).

Dr. Jon Scarpino, M.D.

On December 6, 1996, Dr. Scarpino, a board-certified orthopedic surgeon, was deposed regarding Claimant's previous claim for benefits related to his 1994 back injury. He treated Claimant upon referral by Claimant's family physician. Based on physical examination and radiological testing, Dr. Scarpino diagnosed an axial loading compression injury for which he ordered further testing. (EX-72, pp. 10-15).

After further testing and examination, Dr. Scarpino concluded Claimant sustained a vertebral fracture, which was part of his injury. He opined Claimant could return to a light-duty job in which he would lift "not more than ten pounds. He can do it occasionally. And he can change positions from sitting to standing as often as necessary." He noted Claimant could return to work at

eight hours per day, but should not squat, kneel or twist. He disagreed with other physicians who opined Claimant could return to his prior occupation or to alternative work at the medium exertional level because Claimant's treatment was incomplete. (EX-72, pp. 17, 38-44, 57-58, 98).

Dr. Joseph H. Liu, M.D.

On February 12, 1996, Dr. Liu, whose credentials were not reported, treated Claimant for pain evaluation. Physical examination revealed poor range of cervical motion, which produced lumbar pain. Based on Claimant's history and physical findings, Dr. Liu diagnosed radiculopathy, degenerative disc disease, sacrolitis, and facet arthropathy. Dr. Liu noted Claimant was suffering from insomnia. (EX-69).

Dr. Ralph A. Rittenhouse, M.D.

Dr. Rittenhouse, who treated Claimant for the instant injury, was deposed by the parties on October 4, 2002. (CX-17; EX-32). Dr. Rittenhouse is a family doctor with 45 years of experience. (EX-32, p. 11).

On May 9, 2001, Claimant reported missing one week of work due to migraine headaches which Claimant believed were related to bilateral, upper and lower root canals. He displayed no limitations with arm or leg movement. Likewise, he failed to exhibit any impairments related to sitting, standing, pushing, pulling, driving or lifting. Dr. Rittenhouse did not recall restricting Claimant from returning to work. He prescribed medications for migraine relief and ordered an MRI of Claimant's head, which was reported as "normal," without evidence of brain tumors. (EX-32, pp. 6-7, 10-13, 15-16, 29-30; EX-34, pp. 1-3).

Dr. Rittenhouse acknowledged a May 15, 2001 hand-written medical record entry indicating Claimant failed to report a job injury at his initial visit on May 9, 2001. He noted the handwriting was not his; however, he opined the entry accurately reflected the history provided by Claimant to his nurse. On June 26, 2001, Claimant reported to Dr. Rittenhouse that he was injured on April 23, 2001. Dr. Rittenhouse noted, "It's kind of peculiar that we found that out after two or three visits or something." (EX-32, pp. 7-9; EX-34, pp. 6-7).

Dr. Rittenhouse referred Claimant to a neurologist, Dr. Lore, for further treatment of his headaches, and an ophthalmologist, Dr. Clark, for vision problems. He noted there is a chance Claimant's dental work and migraines could be related, but doubted any

connection existed between the dental work and Claimant's symptoms. (EX-32, pp. 6-7, 24-26). He opined Claimant's migraine headaches were unrelated to Claimant's vision problems. (Ex-32, p. 9).

Dr. Rittenhouse acknowledged a May 15, 2001 entry on insurance form from his office was altered to reflect Claimant was disabled from May 3, 2001 through May 3, 2002. The form originally indicated Claimant was disabled from May 3, 2001 to a date that was "undetermined." The alteration was not made by Dr. Rittenhouse, who denied the handwriting was his. Although his office staff may enter "undetermined" on forms because "we don't sit around and debate about if he's disabled or not disabled," Dr. Rittenhouse has "never" taken a patient off work for one year into the future for headaches. Likewise, he "never" disables patients for one year without establishing persistent symptoms. Based on his records, he concluded his office disabled Claimant from returning to work from May 3, 2001 through May 15, 2001. (EX-32, pp. 16-19, 29-30; EX-34, pp. 2-3).

Dr. Charles K. Clark, M.D.

On January 10, 2003, Dr. Clark, a board-certified ophthalmologist, was deposed by the parties. (EX-29). He treated Claimant once on August 27, 2001. (EX-29, p. 4).

Claimant was "having trouble seeing distance driving at night and trouble seeing to read. And he said he had been having migraine headaches since the accident, April 23, 2001." Physical examination revealed farsightedness. Claimant's vision was "20/30 at a distance," while it was 20/70 "up close . . . [H]e has more difficulty close than far away." (EX-29, pp. 4-6).

Dr. Clark testified vision loss may cause headaches due to eye strain. He opined Claimant's headaches were unrelated to his vision loss "unless he's doing a whole lot of close work" because Claimant's vision loss was "not enough to cause headaches or eye strain that far away." Dr. Clark described "close work" as frequent computer use or "doing anything less than . . . two feet away, normal reading." He opined Claimant's injury was unrelated to his vision loss, which was the natural progression of ordinary aging. He noted that, although vision diminishes gradually, "a lot of people" experience a period of time over one to three months "when all of a sudden it seems like they can't see very well." He opined, "it may have happened around the time of this injury, but I don't think it's from the injury." (EX-29, pp. 7-11).

Dr. Gonzalo Uribe-Botero, M.D.

On September 12, 2002, Dr. Uribe-Botero (Dr. Uribe) was deposed by the parties. (CX-8; EX-20). Dr. Uribe is a board-certified pathologist who treated Claimant before and after the 2001 injury. (EX-20, pp. 6, 39).

On March 26, 1999, Dr. Uribe treated Claimant for cervical complaints and back pain. Claimant wore glasses and reported a history of accidents. Dr. Uribe noted Claimant was "status post trauma in his back with pain and there is a motion restriction for movements of neck and motion restriction for back, forward and bending of the throat." On November 27, 1999, Dr. Uribe noted an MRI indicated a bulging lumbar disc and degenerative changes. Dr. Uribe continued treating Claimant throughout 2000, mostly providing refills for pain medication. (EX-20, pp. 7-11; EX-21, pp. 1-2, 11-12; EX-28).

On January 17, 2002, Claimant presented without a referral for treatment of allergic rhinitis and chronic headaches. Dr. Uribe opined allergic rhinitis may cause headaches. He attempted to eliminate Claimant's exposure to toxic substances by removing Claimant from work for seven days. He referred Claimant to Dr. Berrios, who diagnosed sleep apnea. (EX-20, pp. 13-14, 21-22; 39).

Dr. Uribe opined sleep apnea is not generally related to trauma. He opined Claimant's sleep apnea could be a factor for Claimant's headaches because sleep apnea may result in poor oxygenation of the brain. Claimant suffered from a congenital variation of his cranial vascular system which may cause headaches. Claimant's 1999 ophthalmology report indicates he suffered from myopia which may cause headaches. Likewise Claimant's allergic rhinitis could cause his headaches. Dr. Uribe noted Dr. Berrios prescribed Claimant a migraine headache diet which is designed to reduce allergens and vascular responses that cause headaches. (EX-20, pp. 14-20).

On cross-examination, Dr. Uribe testified he treats Claimant's wife and son, Lee Simmons, Jr. He opined Claimant's migraines might be caused by trauma, chronic sinusitis, and Claimant's family history of migraine headaches. Dr. Uribe's office prescribed Flonase for Claimant's allergies which could cause his headaches. (EX-20, pp. 27-28, 30).

On further examination, Dr. Uribe testified the medical files of Claimant's family members would not be confused with other family members because his office maintains each file separately. (EX-20, pp. 37-38). Dr. Uribe drafted an undated letter indicating

Claimant and his wife sustained injuries in a fight with other individuals at some point prior to 2001. Claimant complained of pain in his legs, upper extremities and neck. (EX-20, pp. 38-39; EX-34, p. 4; Tr. 66).

Dr. Avner Griver, M.D.

On January 6, 2003, the parties deposed Dr. Griver, who is a board-certified medical examiner. (EX-25). He is also board-certified in pain medicine and physical medicine and rehabilitation. (CX-12; EX-25, pp. 30-31; EX-26, p. 15).

Dr. Griver treated Claimant nine times from October 25, 2001 through December 16, 2002 upon the referral of Dr. Rittenhouse. On October 25, 2001, Claimant complained of headaches and neck pain since sustaining a job injury to the "center right of the head on April 23, 2001." Claimant reported no past medical or surgical history. Dr. Griver prescribed therapy which Claimant failed to undergo. Accordingly, Dr. Griver did not recommend further therapy. (EX-25, pp. 5-8, 16, 27, 31, 37, 40; EX-26).

Claimant did not return for follow-up treatment until June 27, 2002, when he complained of back pain and **right** lower leg pain, which were new complaints, in addition to his complaints of ongoing headaches, pain in his neck and behind his eyes. (EX-25, pp. 6-9; EX-26, p. 4). On July 1, 2002, Claimant's MRI and MRA of the brain were normal. Claimant complained of recurring cervical and lumbar pain, which was radiating down his **left** leg rather than his right leg, which was previously painful. (EX-25, p. 20; EX-26, p. 5).

On July 19, 2002, Dr. Griver performed facet blocks on bulging discs in Claimant's lumbar spine, which was "85 to 90 percent" less painful on a July 22, 2002 follow-up at which Claimant reported suffering no pain down his legs. (EX-25, p. 32; EX-26, pp. 3, 6-7). After July 2002, Dr. Griver, who did not record any reports of ongoing cervical problems, focused on Claimant's continuing lumbar problems. (EX-25, p. 26; EX-26, pp. 9-13).

On December 16, 2002, Dr. Griver opined Claimant reached maximum medical improvement and released Claimant to return to work. Claimant was assigned a ten-pound lifting restriction. He was able to continuously stand, walk and sit. He could intermittently lift, bend, squat, climb, kneel and twist. He was able to reach and work above his shoulders, operate foot controls, drive vehicles, and work eight hours per day. Most of Claimant's restrictions were related to his lumbar injury. Without the lumbar injury, Dr. Griver opined Claimant's intermittent climbing restriction would remain, but Claimant would be restricted to

lifting “ten to twenty” pounds. Otherwise, Claimant would not be restricted due to his cervical complaints. Claimant’s use of low dosages of Vicodin would not interfere with his ability to return to work. (EX-11; EX-25, pp. 11-17, 21-22; EX-26, p. 8).

Dr. Griver opined it would be “very difficult” to relate Claimant’s lumbar symptoms and facet joint pain to his April 2001 injury. (EX-25, pp. 38-39). Based on Claimant’s 1994 job injury and his spinal MRI which revealed bulging discs at multiple levels, arthritis, and posterior facet joint abnormalities, Dr. Griver opined Claimant’s lumbar symptoms and facet joint pain were related to arthritis secondary to his 1994 injury. He was certain Claimant’s arthritis pre-dated his initial treatment of Claimant. He added, “it would give [Claimant] more credibility if it was documented in the medical record that his lumbar spine complaints . . . began or were exacerbated or aggravated after his [April 2001] work injury.” He concluded Claimant’s April 2001 injury “is far more likely to impact the cervical spine.” (EX-25, pp. 32-36, 45-46).

Dr. Nelson A. Berrios, M.D.

On February 8, 2002, Dr. Berrios, whose credentials are not of record, examined Claimant, who was referred by Dr. Uribe, for complaints of headache, loud snoring, daytime sleepiness, fatigue and shortness of breath during the night. Dr. Berrios reported Claimant’s symptoms also included dizziness, neck pain, photophobia, and hearing changes. “Head trauma in the past [and] work-related stress” were indicated as “possible precipitating factors.” Dr. Berrios reported, “There is a family history of migraine headaches.” Claimant’s prior MRI was normal. (EX-23, p. 2).

Physical examination revealed normal strength and full range of motion without tenderness in Claimant’s neck and upper extremities. Dr. Berrios ordered an MRI of the brain and a sleep study. On February 14, 2002, Claimant’s MRI was normal. An MRA of Claimant’s brain revealed a congenital variation of the left internal carotid artery, but was “otherwise normal.” On February 19 and 20, 2002, Claimant’s sleep study revealed clinically significant sleep-disordered breathing. Dr. Berrios diagnosed moderate obstructive sleep apnea/hypopnea syndrome and prescribed the use of pressurized oxygen while resting. (EX-23, pp. 5, 8-9, 16, 18-23).

Dr. Ronald De Vere, M.D.

On January 13, 2003, the parties deposed Dr. De Vere, who is board-certified in neurology and Electro-diagnostic testing. At Employer/Carrier's request, Dr. De Vere reviewed Claimant's medical file and performed a physical examination of Claimant on August 23, 2002. (CX-7; EX-38, pp. 7-10).

On September 4, 2002, Dr. De Vere prepared a report based on "very few records."[27] On January 7, 2003, after additional medical records were discovered and provided to him, Dr. De Vere prepared a second report.[28] (EX-38, pp. 10-11; EX-40).

Dr. De Vere agreed with Dr. Griver that Claimant's lumbar complaints would be "very difficult" to relate to the April 2001 job injury. He generally agreed with all of Dr. Griver's restrictions assuming Claimant suffered no back injury from the April 2001 injury; however, he could not offer an opinion on restrictions due to drug use because he was unaware of the dosage or frequency of Claimant's use of Vicodan. In the absence of a back injury sustained in the April 2001 injury, Claimant could lift twenty to fifty pounds post-injury. (EX-38, pp. 12-17).

Neurological examination revealed Claimant's motor strength, sensation, reflexes, and neurological condition were normal.[29] Dr.

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[27] On September 4, 2002, Claimant's complaints included sharp and severe pain in the low back and right leg. The pain was worse with movement and better with medication and facet blocks. No cervical complaints were reported as present complaints, although Claimant reported a history of severe neck pain following his April 2001 injury. In September 2002, Dr. De Vere found "no specific process of the cervical spine" causing Claimant's neck complaints, which might be related to his headaches "due to a muscle contraction component." (EX-40, p. 3).

[28] On January 7, 2003, after he reviewed Claimant's additional medical records related to his 1994 injury, Dr. De Vere questioned whether the April 2001 accident actually occurred. (EX-40, p. 15).

[29] Dr. De Vere noted Claimant's treatment following the April 2001 injury included no cervical injections. Claimant's June 22, 2001 MRI of the head showed no abnormalities. His February 13, 2002 EEG was normal as was his February 14, 2002 MRI of the brain. Claimant's MRA of the brain showed a congenital variation of the left internal cartoid artery, but was otherwise

De Vere found no objective symptoms of pain, although Claimant indicated a subjective complaint of tenderness in his cervical area. Based on Mr. Gordon's written job description of Claimant's job, Dr. De Vere opined Claimant could return to his prior occupation. (EX-38, pp. 17-20; EX-40, p. 15).

Dr. De Vere recommended "pretty simple" physical therapy after-hours and on the weekends which would not interfere with Claimant's ability to return to work. He opined Claimant would not reach maximum medical improvement until he underwent physical therapy. After receiving the therapy, his symptoms could be evaluated, and maximum medical improvement could be determined. Dr. De Vere would not modify Claimant's job requirements while Claimant received physical therapy. Dr. De Vere also recommended a functional capacity evaluation. (EX-38, pp. 20-30).

On cross-examination, Dr. De Vere testified Carrier did not authorize him to order a functional capacity evaluation or physical therapy. However, he was not the treating physician. (EX-38, pp. 35-37).

On further examination, Dr. De Vere testified Claimant previously received the same lifting restriction, namely 20 to 50 pounds, from his job injury in 1994. (EX-38, pp. 43-44).

Dr. Larry L. Likover, M.D.

On January 20, 2003, the parties deposed Dr. Likover, a board-certified orthopedic surgeon. He examined Claimant on January 9, 2003 at Employer/Carrier's request. (EX-41; EX-42, pp. 3-6).

According to Dr. Likover, Claimant reported a history of headaches following an injury in which he bumped his head. Claimant reported a "long history of headaches" predating the instant claim, but denied a history of prior back problems. Physical examination of Claimant revealed a full range of cervical and lumbar strength and motion. There was no evidence of pinched nerves. Claimant's February 2002 EEG and MRI of the brain were normal, although his lumbar spine indicated mild diffuse bulging at L$-5 and L5-S1, which was normal for Claimant's age. There were no objective findings substantiating Claimant's reported injury nor any subjective complaints of increased headaches. Dr. Likover

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normal. Dr. De Vere reported Claimant's cervical and shoulder complaints were "most subjective with no abnormalities on neurologic examination or any of the testing that has been performed." (EX-40, pp. 5-6).

assigned no permanent impairment rating or injury to Claimant's body attributable to the reported injury. (EX-42, pp. 7-14; EX-43, p. 8; EX-44, p. 2).

Assuming Claimant sustained a bump on the head which was related to his complaints of headache, Dr. Likover opined Claimant would have reached maximum medical improvement "less than six months following the injury." Dr. Likover identified no injury which would cause Claimant's back complaints. Rather, he agreed with Dr. Griver's conclusion that Claimant's back complaints were unrelated to his April 2001 injury because of the length of time which passed between the injury and the reported symptoms, which could have been caused "by a multitude of other possibilities" unrelated to the accident. (EX-42, pp. 10-13).

The Vocational Evidence

Mr. Quintanilla

On September 3, 2002, Mr. Quintanilla reported Claimant was a "truck and trailer repairman" for Employer. He repaired chassis and air conditioning and drove a yard hustler and pencil machine. Based on Claimant's medical history and reports, Mr. Quintanilla noted it was "unclear" whether Claimant could return to his prior occupation. He noted Claimant was able to seek employment available in the Houston community within the light to medium exertional levels. (CX-3, p. 4).

On January 14, 2003, Mr. Quintanilla provided another report in which he considered medical opinions of Drs. Likover, De Vere, and Griver. He noted Claimant could return to his prior occupation within the restrictions and opinions of Drs. Likover and De Vere. Dr. Griver appeared to restrict Claimant from lifting more than 20 pounds, which would allow Claimant's return to light jobs, including a variety of unskilled entry-level jobs allowing sitting, standing, and walking as needed. (CX-3, pp. 6-7).

Mr. Quintanilla identified jobs as a mechanic within the medium exertional level which were available with Tex Star Motors (TSM), paying $10.00 per hour, Auto Check #6 (AC), which paid "up to $28.00 per hour - dependent on experience," and M&M Auto Service (M&M), which paid $10.00 to $12.00 per hour. A medium job as a heavy equipment mechanic was available with D&B International (D&B), which paid $13.00 to $15.00 per hour. (CX-3, pp. 8-9).

Mr. Quintanilla identified light jobs available within the community. A counter position was available with EZ Pawn, which paid $8.50 per hour. Jobs as a non-commissioned security officer

were available with Firstwave-Newpark Shipyard (FNS), Doubletree Guest Suites (DGS), and ADF Security (ADF), which paid $8.00, $9.00, and $6.00 per hour, respectively. (CX-3, pp. 9-10).

Mr. Wallace A. Stanfill, M.Ed.

On January 20, 2003, Mr. Stanfill, a certified rehabilitation counselor, provided a vocational rehabilitation assessment of Claimant at Counsel for Claimant's request. He interviewed Claimant on January 14, 2003 and reviewed Claimant's medical and vocational records to prepare his report. (CX-5, pp. 1-2). He noted Claimant reported earnings of approximately $2,700.00 which were earned through supervising construction jobs and performing minor automobile mechanical work. (CX-5, p. 6).

Mr. Stanfill observed Employer's yard and concluded Claimant's occupation constituted "at least Medium physical exertion and more closely approximating Heavy physical exertion," based upon his experience, weights of various parts and tools and job descriptions offered by Claimant, Mr. Gordon and the Dictionary of Occupational Titles. Mr. Stanfill provided general examples of light jobs and median hourly salaries reported by the Texas Workforce Commission, but identified no specific jobs which were reasonably available within the community. (CX-5, pp. 7-8).

Other Evidence

Ms. Sandra Morin

On October 4, 2002, Ms. Morin was deposed by the parties. Ms. Morin is a medical assistant in Dr. Rittenhouse's office. She provided Claimant's medical records pursuant to a subpoena duces tecum. (EX-35, pp. 6-8).

Ms. Morin produced a copy of a May 15, 2001 insurance claim in which Dr. Rittenhouse's office indicated the date Claimant's disability status would terminate was "undetermined." A copy of the same form produced by Claimant includes an alteration indicating Claimant was disabled until May 3, 2002. Ms. Morin entered the original notation, "undetermined," but did not make the alteration. She did not recognize the handwriting of the alteration as Dr. Rittenhouse's handwriting. She performs receptionist duties and would recognize Dr. Rittenhouse's handwriting. Likewise, she did not recognize the handwriting as a co-worker's handwriting. She concluded the document Claimant produced was not a true and correct copy of Claimant's medical record. (EX-35, pp. 7-10, 15; EX-36, p. 1; EX-12, p. 18).

On cross-examination, Ms. Morin testified two other individuals were employed by Dr. Rittenhouse's office at the time the insurance forms were prepared. Neither person remains employed with Dr. Rittenhouse. (EX-35, pp. 15-17).

On further examination, Ms. Morin testified office policy requires obtaining the date of injury when a patient reports a work-related injury. Office policy also requires maintaining copies of insurance forms which are produced. Mistakes are sometimes made. (EX-35, pp. 19-20, 27-28, 30).

Mr. Bobby J. Holden

On January 9, 2003, the parties deposed Employer's president, Mr. Holden. Mr. Holden has worked within the maintenance and repair industry since 1972. (EX-18, pp. 6-7). Employer operates yards, which do "the same thing," in La Porte, Texas, Charleston, South Carolina, and Savannah, Georgia. (EX-18, p. 52).

According to Mr. Holden, Employer's La Porte location, where Claimant worked, was opened in 1997. The yard is approximately 5.6 acres and is bound on the west side by a public road, Broadway Street, which runs from the North to the South. Employer does not operate on the west side of the road. The yard is bound on the north side by private property on which "gas gauges and pipes" are located. On the south side, a sixty foot wide easement separates Employer's yard from its neighbor, Transit Mix, which sells cement. Further south, across a boulevard, residential properties and a school are approximately one-eighth of one mile from Employer's yard. (EX-18, pp. 6-7, 15, 32-34, 51-52; EX-19, p. 33).

Mr. Holden testified Employer's yard is bound on its east side by private property traversed by a railroad track located in a northwest to southeast direction. Navigable waters, which do not adjoin Employer's property, are approximately one-quarter of one mile away directly to the east. To reach the port, Employer's employees travel south on the public road and turn east on the easement between Employer and Transit Mix. The employees continue on the easement to the railroad track where they travel southeast near the railroad track to arrive at the port's entrance. The path over the easement and along the tracks is not a public road. There are other container storage yards in the area, including J.J. Flanagan, which operates a yard to the south of Employer, P&O Terminals and BCSI. (EX-18, pp. 32-34, 68; EX-19, p. 33).

According to Mr. Holden, the location of Employer's yard is not directly related to its proximity to the Barbour's Cut terminal. In 1997, Employer considered locating the yard in other

sites as far as ten miles away; however, the present site was the only location available for lease. Employer could be "10, 15, [or] 20 miles away and still perform the same function." Employer's decision to renew its original lease was unrelated to the proximity of the yard to the port. Rather, the lease was renewed because a property owner offered Employer additional land which that owner would improve. Without the property owner's offer to provide more land and make improvements, Employer would have moved. (EX-18, pp. 15, 41, 65). Mr. Holden noted Employer's yards in Charleston and Savannah are located at least eight miles from nearby ports. (EX-18, pp. 60-62).

Mr. Holden denied Employer loads or unloads cargo. Likewise, it neither builds, dismantles or repairs vessels. It maintains no contracts with the Port of Houston. Rather, Employer is a container storage facility which only receives empty containers for repairs and storage. Containers with cargo never travel through Employer's yard. Generally, empty containers are delivered and removed only by third-party truckers. Hyundai has always been Employer's only customer. Consistent with "the general practice in that area that all facilities are staffed with ILA people," Hyundai required Employer to hire ILA Union members. (EX-18, pp. 13-14, 17-22, 26, 34, 37, 56).

Mr. Holden admitted Employer "sometimes" accepts requests to deliver empty containers or chassis to and from the port for which it maintains its own yard hustler to transport empty containers. Mr. Gordon is responsible for transporting the empty containers between Employer's facility and the port; however, other mechanics may perform the job if he is unavailable. (EX-18, pp. 34-39, 58). Mr. Holden acknowledged Employer's mechanics infrequently travel to the port to service chassis or containers. Employees use Employer's service trucks to reach the port. Mr. Holden was unaware of any such service trips performed in the year preceding his deposition, but noted trips were possibly made in 2001. (EX-18, pp. 62-63).

Based on his familiarity with Employer's business and his experience in the industry since 1972, Mr. Holden agreed with Mr. Gordon's description of Claimant's job. He noted that, in addition to being a walking foreman, Mr. Gordon performs the "same work" which Employer's mechanics perform. (EX-18, pp. 23-25). Mechanics may repair wheels alone with the use of a "wheel pulley." Otherwise, two people may be required to perform wheel repairs. It is acceptable for mechanics who need help to "just sit in the shade out there for 30 minutes or 45 minutes until one of the other guys is through." (EX-18, pp. 47-49, 55-56). Employer provides hydraulic jacks and air compressors on service trucks for employees

to use for lifting chassis. Mr. Holden has never seen snakes nor received reports of snakes on the yard. (EX-18, pp. 52-55).

Mr. James Arthur Williams

On January 30, 2003, the parties deposed Mr. Williams. He has known Claimant for fifteen years and worked with Claimant at ATS. Mr. Williams quit working as an M&R mechanic through ILA Local 28 in 1992 to incorporate his company, Underwood Trucking Company (Underwood), which provides transportation services to clients near the ship channel, the railroads and the airport in the Houston area and around the southwest. (CX-29, pp. 5-9).

Claimant attempted to help Mr. Williams to weld barbecue pits at Underwood's shop, but was not proficient at welding. Fabricating barbecue pits involved cutting four-foot by eight-foot pieces of sheet metal which were lifted by a forklift. Cut sections of metal were welded together while they were held in place by a co-worker. Claimant alternatively welded or assisted Mr. Williams to weld the metal pieces together. A total of three pits were fabricated but went unsold. (CX-29, pp. 11-14).

Mr. Williams denied paying Claimant $1,000.00 to build barbecue pits. A $150.00 check stub is the only record of payment to Claimant by Underwood. Mr. Williams doubted the payment was for any services Claimant performed. Rather, the payment was probably gratuitous. Mr. Williams testified he has been lending Claimant cash for fifteen years without expectation of repayment. (CX-29, pp. 8-9, 15, 20-22).

From his experience as an M&R mechanic with other employers, Mr. Williams denied Mr. Gordon's description of Claimant's job was accurate insofar as it indicated lifting of more than 20 pounds was not required because jacks, which must be loaded and removed from trucks, weigh more than 20 pounds. He estimated jacks weigh about 50 pounds. According to Mr. Williams, a job as an M&R mechanic cannot be performed with a bad back. (CX-29, pp. 31-34).

Mr. Williams indicated tires and wheels, which may be lifted using a "leverage tool," may be rolled onto service trucks. Likewise, acetylene tanks may be rolled to necessary locations. (CX-29, pp. 39, 42). Air hoses on service trucks are heavy, but are coiled around self-winding spools which allow a worker to "just pull it out." After using an air hose, "it rolls itself back up." (CX-29, p. 45).

Although he estimated an impact wrench may weigh 50 pounds, Mr. Williams never observed such a wrench at Employer's facility.

He has “no idea” how much anything at Employer’s facility weighs. (CX-29, pp. 47-48). Mr. Williams admitted he never worked with Employer, nor witnessed Claimant at work with Employer. He has never been to Employer’s yard. He is unfamiliar with Claimant’s nicknames among union members. (CX-29, pp. 38, 40, 43-44).

The Contentions of the Parties

Claimant asserts he struck his head beneath a truck chassis while in the course and scope of his employment for Employer on April 18, 2001, when he attempted to escape from a snake by quickly pushing away on a creeper.[30] He alleges he reported the injury to Mr. Gordon, his supervisor. He claims he missed work and continues to suffer headaches from the injury, which caused a severe injury to his neck.

Claimant alleges the Act applies to his claim because it is undisputed that he repaired containers used for maritime purposes, satisfying the “status” requirement. He argues Employer’s facility is located about one-quarter mile from navigable waters in an area which is arguably as close as possible to navigable water and where adjoining properties are devoted primarily for use in maritime commerce, satisfying the “situs” requirement.

Claimant contends he cannot return to the heavy demands of his prior occupation, but may return to lighter jobs with an earning capacity of $8.00 to $10.00 per hour or $360.00 to $400.00 per week. He argues he reached maximum medical improvement on December 16, 2002, based on the restrictions of Drs. Griver and DeVere.

Claimant maintains his average weekly wage may reasonably be approximated under Section 10(a) of the Act because he normally worked five days per week for substantially the whole of the year immediately preceding his injury. Under Section 10(a) of the Act, Claimant argues his average weekly wage may be calculated as $993.70.

Claimant argues he was forced to obtain medical care without the help of Employer/Carrier. He contends there is no evidence indicating the medical treatment he received was not reasonable nor customary. Accordingly, he argues Employer/Carrier should be responsible for the medical care he received. He asserts there is no evidence he failed to comply with Section 7(d) of the Act. He

[30] At the hearing, Counsel for Claimant noted a new claim was filed for Claimant’s alleged back injury, which is not part of the instant claim. (Tr. 13-18, 50).

argues he was not obligated to comply with the ten-day notice of medical treatment provision under Section 7 of the Act because Employer/Carrier continually denied coverage since he filed his claim.

Employer/Carrier assert Claimant's credibility suffers because his testimony is "rife with contradictions and errors." Likewise, they allege Claimant's oral and written statements find no factual support in the record. Consequently, they argue his representations of factual circumstances should be assigned no probative value, which precludes the invocation of the Section 20(a) presumption of compensability under the Act.

Employer/Carrier deny the Act applies to this matter because Claimant works three miles from navigable waters that do not adjoin the situs of the alleged accident. They argue the status requirement under the Act is not satisfied because Claimant worked as a mechanic performing minor repairs to trucks used for moving containers.

In the event jurisdiction under the Act is established, Employer/Carrier argue Claimant's story is incredible, no presumption under Section 20(a) of the Act applies to his claim, no causation exists, or, in the alternative, Claimant is not disabled because he could have returned to his former occupation despite the alleged head injury.

Employer/Carrier assert Claimant was never disabled from returning to work, based on the medical opinions of record, which establish Claimant sustained restrictions from a prior injury and that he could return to work within those previous restrictions. Likewise, they argue Claimant sustained no loss in wage-earning capacity, as indicated by his return to other employment which paid wages exceeding his wages with Employer. They further contend suitable alternative employment paying as much as $28.00 per hour was established by Claimant's testimony and the evidence presented by the vocational expert.

Employer/Carrier deny liability for medical benefits because they argue Claimant never requested authorization nor reported the costs of medical treatment to Employer/Carrier. They assert Section 8(f) applies to this matter because Claimant sustained a previous back injury which resulted in restrictions. They note Claimant "has no disability because his lifting restriction before the accident is the same lifting restriction after the accident."

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Jurisdiction under The Act

To establish jurisdiction under the Act, a claimant must show that he was engaged in "maritime employment" (the "status" requirement), and that the injury took place on "the navigable waters of the United States," including certain adjoining areas "customarily used ... in loading, unloading, repairing, dismantling, or building a vessel" (the "situs" requirement). 33 U.S.C. § 902(3); Herb's Welding, Inc. v. Gray, 470 U.S. 414, 17 BRBS 78, 79(CRT) (1985).

Status

An employee is engaged in maritime employment as long as some portion of his job activities constitute covered employment. Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977); Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981); Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984). An employee is covered so long as his involvement in maritime activities is not too episodic, momentary or incidental to non-maritime work. Boudloche, supra. Container repair is covered employment because

it is essential to the container's continued use. Insinna v. Sea-Land Service, Inc., 12 BRBS 772 (1980). Repair and maintenance of equipment used in loading and unloading is integral to the loading process. Sea-Land Service, Inc. v. Director, OWCP, 685 F.2d 1121 (9th Cir. 1982). Thus, a claimant who spends part of his time repairing chassis used to move cargo within a port area, repairing forklifts and repairing and inspecting containers is a covered employee. Id.

Claimant contends it is undisputed that he repaired containers which were used for maritime purposes. He argues that his work involved repairing and maintaining containers and chassis used to transport containers, which is "an integral part of the loading and unloading of [a] ship and is therefore covered employment." He notes that he and Employer's other mechanics are members of the ILA Union.

Employer/Carrier aver Claimant was not engaged in maritime employment because Employer maintains and repairs containers and chassis that are brought in by third-party truckers." They assert Claimant did not move cargo around a ship, nor did he unload a ship. They contend that it was not normal for Claimant to enter any marine terminal. They argue that "most" of Claimant's work was performed "on truck chassis, not containers." After containers were serviced by Claimant, they were returned via highway or rail. They argue mere membership in the ILA Union does not create jurisdiction and note that ILA Union members are hired at customers' requests rather than for any specialized knowledge or skills. They contend Claimant admits he was inspecting a truck chassis rather than a container at the time of injury. Thus, Employer/Carrier maintain Claimant was not engaged in maritime employment, which precludes recovery under the Act.

This matter is analogous to the facts presented in Coleman v. Atlantic Container Service, Inc., 22 BRBS 309 (1989), aff'd, 23 BRBS 101 (CRT) 904 F.2d 611 (11th Cir. 1990). In Coleman, the employer provided equipment maintenance and repair services to shipping companies, specifically repair and maintenance of chassis and containers. The employer provided services at its own inland facility for major repairs and at the port facilities of the Georgia Port Authority for minor repairs and "roadability" services. The claimant worked on containers and chassis that were carrying cargo inland from the port and on those coming into the port from inland locations. While the majority of the claimant's work was on containers and chassis bound inland from the port, some of his work involved equipment going to the port from inland. He also performed "some work" on chassis and containers that were used only within the port facility. His principal duty was to ensure

containers and chassis met the legal requirements for operation on public highways. Although the bulk of his work was on chassis, a portion was on containers. Coleman, 22 BRBS at 311.

The Board affirmed an administrative law judge's finding that the claimant was a covered employee because: (1) his work was in furtherance of the employer's concerns; (2) the employer was in the business of providing equipment repair and maintenance to shipping companies engaged in the transportation of cargo; (3) the claimant's overall employment facilitated the movement of cargo between ship and land transportation, which was maritime in nature; (4) the claimant's specific work on containers coming into the port to be put on ships was directly integral to the loading and unloading process and, thus, clearly covered employment; (5) the claimant spent at least some of his time on indisputably maritime activities; and (5) the record failed to establish claimant's activities were so momentary or episodic as to place him outside the coverage of the Act. Coleman, 22 BRBS at 311-312.

The Board's decision in Coleman was affirmed by the Eleventh Circuit in Atlantic Container Service, Inc. v. Coleman[ACS], which approved of the Board's reliance on Boudloche, supra, a matter arising within the Fifth Circuit, in which the instant matter arises. ACS, 904 F.2d 611, 617-618 (11th Cir. 1990) (citing Caputo, supra; P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979); and Chesapeake and Ohio Railway Co. v. Schwalb, 493 U.S. 40, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989)). Specifically, the Court found that maintenance of chassis, which must be kept in good condition to support the containers attached to them at dockside and to be hauled by hustlers as well as tractor trucks, is "essential to prevent the loading and unloading process from breaking down." Similarly, periodic container repair was found by the Court to be "essential to the loading and unloading process." The Court added, "To say that the unloading process is complete when the chassis is unhooked from the hustler merely reinvigorates the point of rest doctrine repeatedly rejected by the Supreme Court." ACS, 904 F.2d at 618.

Like the facts in Coleman, the testimony of Mr. Holden, Mr. Gordon and Claimant establish Employer provides equipment maintenance and repair services, namely repair and maintenance of chassis and containers, to Employer's only customer, Hyundai, a company which leases its containers to third parties for shipping cargo over land and sea. Employer provides services at its own inland facility for major repairs and at the port facilities of Barbour's Cut for minor repairs and "roadability" services. Although Mr. Holden could not describe Claimant's actual duties, the testimony of Mr. Gordon and Claimant establishes Claimant

worked on containers and chassis used to carry cargo inland from the port and on those coming into the port from inland locations. Mr. Holden agreed Employer's employees use Employer's service trucks to provide repairs at the port to service chassis or containers.

Claimant and Mr. Gordon agree that, while the majority of Claimant's work was performed on containers and chassis bound inland from the port, some of his work involved using Employer's yard hustler to transport equipment going to the port from Employer's inland facility. Claimant's principal duty was to ensure containers and chassis met the legal requirements for operation on public highways. Although the bulk of Claimant's work was on chassis, a portion was on containers.

Accordingly, I find Claimant established status as a covered employee for the reasons identified in Coleman, namely: (1) Claimant's work was in furtherance of Employer's concerns; (2) Employer is in the business of providing equipment repair and maintenance Hyundai, which leases its containers to customers for the transportation of cargo by sea and land; (3) Claimant's overall employment facilitated the movement of cargo between ship and land transportation, which was maritime in nature; (4) Claimant's specific work on containers coming into the port to be put on ships was directly integral to the loading and unloading of cargo; (5) Claimant spent at least some of his time on indisputably maritime activities; and (5) the record failed to establish claimant's activities were so momentary or episodic as to place him outside the coverage of the Act. Moreover, I find Claimant's work as a maintenance and repair mechanic on chassis and containers is "essential to the loading and unloading process" for the reasons set forth in ACS, supra.

Employer/Carrier cite cases which are inapposite to the facts at hand. Specifically, Employer/Carrier urge reliance upon the holdings of Caldwell v. Oceanic Container Services, Inc., 13 BRBS 153 (1980) (the Board reversed the findings of an administrative law judge and held that a mechanic who repaired containers was a maritime employee because his job was essential to a container's continued use in longshore operations and, thus, bore a functional relationship to maritime transportation) and Tamajon v. Courtesy Container Corp., 19 BRBS 663, 665 (ALJ) (1987) (a mechanic who repaired vehicles which lift containers off of or onto trucks did not have a close enough functional nexus between his work and typical "longshoring" duties to meet the status requirement) for the proposition that Claimant's work as a mechanic repairing trucks used for containers does not establish maritime status.

In Caldwell, the Board discussed mainly Third Circuit jurisprudence and rejected an employer's argument analogous to that proposed by Employer in the instant claim. There, the employer argued that, "with the exception of occasional shipside duty, a claimant's work looked more to land-based commerce than to the sea and, therefore, did not constitute maritime employment." The Board disagreed and held that container repairmen perform duties essential to a container's continued use in longshore operations and, thus, their employment bears a functional relationship to maritime transportation. Caldwell, 13 BRBS at 156 (citing Cabezas v. Oceanic Container Service, Inc., 11 BRBS 279 (1979) (five container repairmen were engaged in maritime employment as defined by Section 2(3) of the Act)).

The administrative law judge's opinion in Tamajon, supra, cited by Employer is not binding, nor persuasive. There, the administrative law judge found a claimant was not covered in a cryptic opinion which leaves little analysis for the undersigned to consider. Moreover, the opinion is arguably overruled in light of the more recent Supreme Court jurisprudence discussed in ACS, supra. Accordingly, I am unpersuaded by Employer/Carrier's arguments to conclude Claimant's work fails to constitute maritime status.

Situs

Section 3(a) of the Act provides that:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a) (1994).

To be considered a covered situs, an "adjoining area" must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (CRT) (5th Cir. 1980) (the Fifth Circuit rejected the position that the presence or absence of non-maritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the Act because such a rule would introduce into the tests for coverage a "new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime

sites"). An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. Winchester, 632 F.2d at 504, 12 BRBS at 719, 726 (citing Brady–Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141, 7 BRBS at 409 (9th Cir. 1978)).

The Board has affirmed the use of factors set forth in a "functional relationship test" enunciated in Herron, supra, for determining whether claimant's injury occurred on an "adjoining area," namely: 1) the particular suitability of the site for the maritime uses referred to in the Act; 2) whether adjoining properties are devoted primarily to uses in maritime commerce; 3) the proximity of the site to the waterway; and 4) whether the site is as close to the waterway as feasible given all the circumstances of the case. Arjona v. Interport Maint. Co., Inc., 34 BRBS 15, 17-18 (2000), per curiam (citing Herron, supra at 141).

In Arjona, a container repairman was injured when he cut his left hand with an electric saw while repairing a container at his employer's facility. The facility was about 1/4 mile from Newark Bay, a navigable waterway, and about 1/2 to 1 mile north of the Port Newark-Port Elizabeth Terminal. Employer's property occupied approximately 70 acres of land within a Conrail yard, and was bounded on the north, south, and east sides by Conrail railroad tracks. To the west, the facility was bounded by an interstate highway which was not accessible to or from the employer's yard. There was no water access to the property; rather, the only access was by three roads, one of which was undeveloped, over the railroad tracks. Arjona at 15-16.

The employer in Arjona was in the business of repairing intermodal containers which were owned by its customers. The owners leased the containers to "shipping" companies for use on ships, railroads and trucks, and upon expiration of these leases, the containers were brought to employer for repair and/or storage. Employer did not transport the containers. Owners would send trucks to retrieve containers upon the completion of repairs, or the container was stored with the employer. Id. at 16.

The Board affirmed an administrative law judge's opinion that covered situs was not established where: (1) the employer's site was chosen by economic factors considered by businesses generally, and specifically, by the low per-acre cost of the rent as indicated by unrefuted testimony; (2) the adjoining properties, which included a warehouse, a trucking terminal, a limousine facility, a sewage treatment plant, a railway switching yard, and a metal processing plant, were not shown to be primarily devoted to

maritime business pursuits; (3) the site was not otherwise particularly suited for maritime purposes although the location of the site was of some economic benefit to employer due to its proximity to the port; and (4) upon consideration of all of the Herron factors, the evidence was, at best, in equipoise on the issue of whether employer's facility constitutes a maritime situs within the meaning of Section 3(a) of the Act. Arjona at 17-18.

According to the Board, it was "clear that employer's property [did] not have a sufficient functional nexus to maritime activity to warrant a finding of coverage under the Act" because "only the proximity of the site [to] the port and the economic benefit it [allowed] employer in lowering its customers' costs of transporting containers between the port and the yard supports a finding of coverage." Such a factor alone was insufficient to support a finding of covered situs. Arjona at 19 (citing Lasofsky v. Arthur J. Tickle Engineering Works, Inc., 20 BRBS 58 (1987) per curiam).

Unlike the employer in Arjona, Employer in this matter transports containers. Employer periodically delivers or retrieves chassis and containers from the port. Moreover, I find the record supports a conclusion that Claimant was injured on a covered situs under the Herron factors.

I am unpersuaded by Mr. Holden's testimony that the location of the yard, which is one-quarter of one mile from the navigable waterway and two to three miles from the port, was chosen solely because of a favorable lease to conclude the location of the yard is merely fortuitous. Undermining the persuasiveness of his testimony is Employer's ongoing use of its own yard hustler to transport equipment to and from the port. The hustler, which is not roadworthy, is driven along a short path over a private easement to the port terminal rather than a more circuitous path over public roads.

Although Employer/Carrier might argue this fact merely results in an ability to lower the costs of transportation, a consideration of the remaining Herron factors buttresses the conclusion that Employer's yard is an "adjoining area." BCIS, whose property adjoins Employer's, operates a similar yard, while J.J. Flanagan, which also operates a similar yard, is a nearby neighbor to the south. Employer/Carrier argue Employer's yard is surrounded by unrelated industries, including a cement mixing company and a refining plant. They also argue that there is adjoining property on which oil gauges are installed to the north as well as residential and unrelated commercial properties farther south.

Employer/Carrier's argument overlooks Mr. Gordon's testimony that Employer's yard is located as close to the waterway as feasible given all the circumstances of the case. With the exception of the cement mixing company, all of the unrelated properties Employer/Carrier identify are farther from the port than Employer's yard or are separated from the port by a public road and a public boulevard. The only properties within the distance from the port to Employer's yard include two container storage and repair facilities and the cement mixing plant. Accordingly, I find adjoining properties are devoted primarily to uses in maritime commerce.

Moreover, I find the record supports a conclusion that Employer's yard is situated in an area particularly suitable for maritime commerce. Employer/Carrier argue Employer's yard was once maintained as an automotive service facility. In Lasofsky, supra, Claimant failed to establish an Employer's facility was located in an area particularly suited for maritime use where it was established the employer relocated from an area 100 feet from the water to an area which was previously used for manufacturing pallets and cinder blocks, two to three miles away for an advantageous lease. 20 BRBS at 60-61. In the present matter, it is noted that Employer's yard has been successfully used for container repairs and storage since 1997. Further, Employer's lease was renewed from a monthly lease to a multi-year lease upon Employer's expansion at the site, arguably indicating the site is particularly well-suited for container storage and repairs.

In light of the foregoing, I find: (1) Employer's yard is particularly suitable for the maritime uses referred to in the Act; (2) adjoining properties are devoted primarily to uses in maritime commerce; (3) the site is one-quarter of one mile from the waterway and two to three miles from the port; and (4) the site is as close to the waterway as feasible given all the circumstances of the case. Accordingly, I find Employer's yard is a covered situs under Herron, supra.

Lastly, Employer/Carrier argue Claimant was not on a covered situs when he was allegedly injured because he only performed "minor, not major" repairs to containers and chassis, relying on the holding of Lopez v. Sea-Land, Inc., 27 BRBS 649 (ALJ)(1994). Employer/Carrier's reliance upon the holding of Lopez, which is not binding authority on the instant matter, is misplaced.

In Lopez, a company, Flexi-Van, leased containers to the claimant's employer, Sea Land, Inc. (Sea-Land), which would provide its own maintenance and repairs to the containers until they were no longer suitable for shipping cargo, at which time they were sold

back to Flexi-Van, which would use the retired containers for reasons unrelated to maritime shipping. Other than the lease and buy-back contract, Flexi-Van and Sea-Land were not connected. The claimant was injured while delivering an empty container, which was no longer being used for shipping cargo, on Flexi-Van's private property, seven miles away from Sea-Land's Terminal and the Port of Oakland. The administrative law judge in Lopez found Flexi-Van's property was never used as a marine terminal either for storage or for stuffing and stripping containers. She added:

> Such minor repairs as [Flexi-Van] performed to render the containers acceptable to Sea-Land, before the containers [sic] introduction into the stream of maritime commerce, or such repairs as it made to containers sold back by Sea-Land, after their rejection from the stream of maritime commerce are irrelevant so far as the establishment of a functional relationship between the Flexi-Van operation and maritime commerce is concerned.

Lopez, supra at 652-656.

Unlike the facts considered in Lopez, Claimant was allegedly injured at a site which has been found to be a covered situs under the criteria set forth in Herron and Winchester. The credible and uncontroverted testimony of record establishes Employer stored, maintained and repaired cargo containers and chassis for Hyundai, which provided the containers to customers desiring to ship cargo by sea or by land. Further, as noted above, Employer periodically serviced, delivered or retrieved containers at the port. Thus, I find the storage, maintenance and repairs Employer provided are not irrelevant so far as the establishment of a functional relationship between Employer's operation and maritime commerce is concerned. Accordingly, I am unpersuaded by Employer's reliance on the holding of Lopez to conclude Claimant was not injured on a covered situs because he only performed "minor, not major" repairs.

B. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

Claimant's burden of persuasion rests principally upon his testimony. His testimony regarding events which are germane to a resolution of the instant matter was not corroborated by the testimony of other witnesses nor supported in the record. It was at times contradictory, vacillating, and presented in an inconsistent manner. I found Claimant generally less impressive as a witness in terms of confidence, forthrightness and overall bearing on the witness stand, which detracts from his demeanor and believability. Accordingly, I was not favorably impressed with Claimant's testimony.

Claimant's testimony that he struck his head with such force that he broke a slack adjuster in half and lost his senses for two hours after being surprised by a large, frightening snake while using a creeper is not supported by the record. There is no evidence of a broken slack adjuster nor the presence of a snake, namely a water mocassin, in the record. Rather, Mr. Holden offered credible and persuasive testimony he has never seen nor received reports of snakes on the yard, which is separated from water by another employer's facility and a railroad track. Although Claimant indicated he has seen many snakes on Employer's yard in the "summertime," he failed to indicate whether he observed snakes in April, other than the instant injury.

There is no evidence supporting Claimant's testimony that he reported a job injury involving a snake to his physicians. Rather, Dr. Rittenhouse's testimony and records persuasively establish Claimant initially reported headaches related to non-compensable dental work. Although Dr. Rittenhouse's testimony and records indicate Claimant eventually reported a work-related head injury, there is no indication Claimant reported the snake story. Likewise, the testimony and records of Drs. Uribe, Griver, and Likover fail to discuss an injury involving a snake.

Claimant's testimony that he discussed the snake and creeper incident with his co-workers and wife is not supported by the record. Rather, Mr. Gordon persuasively and credibly testified he was informed of no snake until Claimant's attorney contacted him with the information well after the instant claim was filed. Claimant's failure to call his wife or other co-workers as witnesses to corroborate his testimony that he related the events of his injury to them diminishes the strength of Claimant's allegations that he reported his injury involving a snake to anyone.

Claimant's testimony that his injury was the result of using a creeper which became lodged on a rock finds no factual support in the record. Although Claimant's deposition testimony indicated

Employer owned a "modified creeper," there is insufficient evidence establishing Employer owns such a creeper. Rather, Mr. Gordon persuasively indicated Employer does not own a creeper because it would not work at the yard. Mr. Gordon's testimony is arguably buttressed by Claimant's testimony that there are rocks on the soft ground at the yard.

Moreover, Claimant's testimony regarding the location of his injury was vacillating. His deposition and hearing testimony clearly indicated he sustained an injury to the "**back** part of the top of his head." However, his hearing testimony elsewhere unequivocally indicated he sustained a knot, which Claimant failed to discuss in his deposition, on the "top **front** side" of his head after the injury. Meanwhile, he reported to Dr. Griver that he sustained an injury to the "center **right** side of the head," but reported to Dr. Likover that he sustained an injury to the "center **left**" side of his head. His deposition testimony also indicated he injured the "**straight center**" part of his head. Without physical findings or objective MRI and radiological evidence establishing Claimant sustained an injury or the location of such an injury, I find Claimant's vacillating testimony is entirely unhelpful for a resolution of the matter.

Claimant's testimony that he reported an injury was contradictory. He testified that he was unable to report an injury to Mr. Gordon on the date of the alleged injury, yet later testified he so informed Mr. Gordon on the date of his alleged injury. His explanation for the testimonial discrepancy was that he briefly disclosed his job injury to Mr. Gordon without describing its details, which I find specious. Claimant alleged he informed Mr. Gordon of his injury on at least four different occasions, including April 18, 19, 23 and 24, 2001; however, he candidly admitted he was never drug-tested, despite his testimony elsewhere that Employer maintains a strict policy of immediately drug-testing employees who report job-related injuries.

On the other hand, Mr. Gordon denied Claimant reported a job injury. Rather, Mr. Gordon alleged Claimant reported that he would treat independently for complaints of non-work-related brain tumors, dental work, and swollen blood vessels. Mr. Gordon's testimony is buttressed by Claimant's unequivocal hearing testimony that he directed Mr. Gordon **not** to provide an accident report for any work-related injury because he would seek treatment on his own. Claimant's testimony that he could not believe his headaches were related to his bump on the head further supports Mr. Gordon's testimony that Claimant reported symptoms which were not related to a job injury. Claimant candidly admitted discussing brain tumors, swollen blood vessels and dental work with Mr. Gordon on May 2,

2001, which further supports Mr. Gordon's testimony that Claimant reported non-work-related symptoms.

Although Claimant denied relating his headaches to brain tumors, dental problems and swollen blood vessels, Dr. Rittenhouse's testimony and records indicating Claimant initially related his headaches specifically to prior dental work undermines the persuasiveness of Claimant's testimony and buttresses the persuasiveness of Mr. Gordon's testimony. I find Dr. Rittenhouse's records, which were prepared very shortly after Claimant's alleged injury, are more persuasive than Claimant's testimony provided well over one year later.

Claimant's testimony elsewhere that he discussed brain tumors, blood vessels and dental work with Mr. Gordon after he and his wife discovered such maladies can cause headaches further diminishes his testimony that he never related the ailments to his symptoms. Accordingly, I find Claimant's testimony that he did not relate his headaches to various non-compensable maladies is unpersuasive.

Further, I found Claimant's testimony that he confused the dates of injury due to the side-effects of medications, including Depakote and Imitrex prescribed by Dr. Uribe shortly after his accident, was unpersuasive. Dr. Uribe's medical records and testimony unquestionably indicate Claimant did not treat with him for the instant injury until January 2002, long after the alleged April 2001 date of injury and well beyond May 2001, when Claimant and his wife completed insurance forms with the incorrect dates of injury. The persuasiveness of Claimant's testimony that Dr. Uribe's records must be mistaken due to a clerical error related to his son's medical file was undermined by Dr. Uribe's credible and persuasive testimony that such confusion would not occur.

Moreover, Claimant did not visit Dr. Rittenhouse until May 3, 2001 at the earliest, according to insurance forms completed by Dr. Rittenhouse's office. Claimant could not recall if Dr. Rittenhouse prescribed medications to him. Dr. Rittenhouse's testimony and records establish Claimant was treated by Dr. Rittenhouse on May 9, 2001, when Claimant received a prescription for medications, including Depakote. Thus, even if Claimant confused post-injury medical providers, there is no documentation supporting Claimant's contention that he was prescribed drugs by a physician on or shortly after April 18, 2001. Accordingly, I find Claimant's explanation that he confused the dates of injury because of the side-effects he experienced from prescribed medications shortly after his accident is unpersuasive.

Further, it is noted that Claimant's testimony regarding drug use was vacillating. He admitted using Vicodin prior to his job injury because of ongoing back pain related to his 1994 injury; however, he used only Tylenol after his head injury. Although he stated he asked some individuals for some kind of severe headache relief, he never indicate such relief was provided or by whom it was provided. Later, he stated his wife provided Tylenol and "Vicodans and whatever." In his *ex parte* letter to this office, Claimant stated he sustained memory loss while under the influence of Depakote and Imitrex. Accordingly, it is unclear from his testimony which drugs he was taking before, during and after his injury.

Claimant's testimony that Mr. Gordon incorrectly reported discussions about Claimant's April 2001 visit to Austin was unconvincing. Although Claimant introduced evidence that he may have visited Austin in March 2001, I find the evidence fails to diminish the persuasiveness of Mr. Gordon's testimony that Claimant discussed going to Austin to visit the F.B.I. in April 2001. Mr. Gordon offered persuasive testimony that Claimant reported his trip and possible follow-up visits with the F.B.I. Claimant's inconsistent and unsupported descriptions of an alleged Chapter 13 filing which involved the F.B.I. failed to detract from the persuasiveness of Mr. Gordon's testimony regarding Claimant's alleged April 2001 visit to Austin. Therefore, I find Claimant's testimony that Mr. Gordon inaccurately reported his Austin trip is unpersuasive.

Claimant's testimony that he is the victim of a conspiracy by Mr. Gordon and his co-workers is factually unsupported in the record. Claimant's failure to call witnesses to explicate the events of an alleged conspiracy diminishes the persuasiveness of his allegations. Moreover, as Claimant notes in his post-hearing brief, Mr. Gordon complemented Claimant, referring to him as an excellent worker who was "one of the best he ever had." Claimant indicated a controversy arose because Mr. Gordon was hiring "buddies;" however, Mr. Gordon unquestionably testified he had no problem with Claimant. Further, Mr. Gordon recommended Employer should hire Claimant because he enjoyed a favorable relationship with Claimant as a co-worker on a former job. Accordingly, I find Claimant's testimony that he is the victim of conspiracy related to Mr. Gordon's nepotism is unpersuasive.

Claimant's testimony regarding his symptoms was contradictory. He acknowledged his gradual vision loss since 1994, but elsewhere stated his vision loss occurred after the instant injury. He indicated he sustained continuing and ongoing migraine headaches following his job injury; however, he specifically testified at his

deposition that his headaches resolved with the use of a machine prescribed for sleep apnea. At the hearing, however, he indicated the sleep apnea device merely caused his symptoms to abate. Without objective support in the record, Claimant's testimony fails to establish he suffers ongoing complaints related to any alleged injury in April 2001.

Moreover, Mr. Gordon's credible and uncontroverted testimony that Claimant is known among fellow union members as "Lying Ass" Simmons because he exaggerates stories further undermines Claimant's persuasiveness and credibility regarding the events at issue. Mr. Gordon persuasively established he is familiar with the union and frequents the union hall. Claimant's testimony that he casually ran into Mr. Gordon at the union hall buttresses Mr. Gordon's testimony that he frequents the union hall and is familiar with union members. Although Mr. Williams indicated he was unaware of Claimant's nickname among union members, he admitted he has not been active with the union since 1992. Accordingly, I find Mr. Williams's testimony fails to diminish the persuasiveness of Mr. Gordon's testimony regarding Claimant's reputation within the community.

Although Mr. Gordon could not recall a specific instance when Claimant exaggerated events, he generally noted an alleged discrepancy between Claimant's reports of his military history. A review of the record indicates Claimant reported serving in the Army, yet denied serving in the Army. He reported obtaining his GED through the Army, yet denied obtaining his GED through the Army. Claimant reported a history of service in the Army Reserve, but also reported serving in the National Guard. Claimant indicated he served in Cambodia in 1975, yet elsewhere stated he served in a "battle unit" in Vietnam in 1975 and 1976. Despite his military service that may have lasted from two to eight years, Claimant could not recall his military identification number. Accordingly, the record supports Mr. Gordon's testimony insofar as Mr. Gordon indicated Claimant's reports of his military service may not be accurate.

Further, Claimant's hearing testimony that he is a pastor of a church was undermined by factual inconsistencies in his testimony elsewhere. Claimant indicated his daily activities include doing "nothing" but visiting friends and physicians, accompanying his wife on errands, reading a Bible and stopping by church. There are no wage records or employment data indicating Claimant works as a pastor of a church. In his prior claim, Claimant indicated he performed various jobs for churches which might pay him through intermittent gratuitous donations; however, Claimant provided no documentation of income. Accordingly, I find Claimant's

inconsistent testimony undermines the persuasiveness of his representations that he is a church pastor, which arguably buttresses Mr. Gordon's testimony that Claimant tends to embellish factual situations. It is noted Claimant apparently reported to one physician he was seeking a Master's degree in Theology, despite his failure to obtain an undergraduate degree.

Although Claimant presented witnesses disputing Mr. Gordon's written description of Claimant's job, I found their testimony was not helpful for a resolution of the instant matter. Neither Mr. Williams nor Mr. Mangum was familiar with Employer's yard. Both witnesses admitted job descriptions vary among employees according to employers and the skills and proficiencies demonstrated by employees. Neither witness could confirm or deny Employer possessed various tools at issue, nor could they confirm or deny Claimant's ability to perform his job for Employer. Accordingly, I found their testimony failed to diminish the persuasiveness of Mr. Conroy's written job description.

Claimant's testimony that Mr. Gordon was unfamiliar with his job description because Mr. Gordon failed to work in Claimant's capacity as an M&R mechanic was disputed by Mr. Gordon. Mr. Holden credibly and persuasively confirmed Mr. Gordon's testimony that he performed the "same work" as Claimant's co-workers. Accordingly, I am more persuaded by Mr. Gordon's testimony that he performs the same tasks as his co-workers in addition to his job as a walking foreman. Thus, I find Mr. Gordon's description of Claimant's job is persuasive and useful for a resolution of the instant claim.

I was favorably impressed with the remaining witnesses, Ms. Lelivelt and Mr. Quintanilla; however, to the extent Claimant may have inaccurately reported his failure to obtain a GED, I find Mr. Quintanilla's vocational opinions, as well as those of the non-testifying vocational expert Stanfill, regarding suitable alternative employment may be inaccurate. Otherwise, I found the hearing testimony of Ms. Lelivelt and Mr. Quintanilla credible and consistent with the record evidence.

Accordingly, after thoughtful consideration and evaluation of the rationality and consistency of testimony adduced by the parties and the manner in which the testimony supports or detracts from other record evidence, I find Claimant's testimony is unsupported, unpersuasive and unreliable. On the other hand, I find the testimonial evidence adduced from Employer/Carrier's witnesses was persuasive, credible, corroborated and supported by the record.

C. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends he injured his head in an attempt to escape from a snake which surprised him while working beneath a chassis. Employer/Carrier contend Claimant lacks credibility and has failed to invoke the presumption of compensability under Section 20(a) of the Act.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Claimant's unsupported testimony that he sustained a harm or pain as a result of his job injury lacks credibility, as noted above. Without objective MRI data or physical findings supporting a conclusion Claimant actually sustained a harm or pain related to

his alleged head injury, I find Claimant failed to establish a harm or pain necessary to invoke the Section 20(a) presumption.

Likewise, Claimant's unsupported testimony that he sustained a work-related injury lacks credibility. Consequently, Claimant failed to establish his alleged accident, which was not witnessed by anyone, actually occurred. Similarly, Claimant's testimony fails to establish conditions existed at work which could have caused harm or pain.

Thus, Claimant has failed to establish either element of a **prima facie** case that he suffered an "injury" under the Act and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Assuming **arguendo** Claimant established a **prima facie** case, which I find unsupported by the record, a presumption is invoked under Section 20(a) of the Act that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Drs. De Vere and Likover questioned whether a job accident occurred. Both physicians found no objective evidence of ongoing pain. Both physicians noted normal muscle strength and range of motion upon physical examination. Dr. De Vere opined Claimant could return to his prior occupation, while Dr. Likover assigned no permanent impairment from an alleged bump on Claimant's head. Accordingly, I find Employer/Carrier presented evidence that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. Thus, the record evidence must be weighed as a whole for a resolution of the matter.

3. Weighing the Record Evidence

The medical opinions of record fail to establish what caused Claimant's ongoing headaches. Dr. Rittenhouse treated Claimant for his headaches, which were reportedly due to prior dental work, but failed to diagnose the cause of the headaches. Accordingly, he referred Claimant to an ophthalmologist and neurologist.

Dr. Clark, who was Claimant's treating ophthalmologist, opined that vision loss generally diminishes after reaching forty years of age. His opinion is buttressed by his August 2001 diagnosis of ongoing vision problems requiring bifocal corrective lenses. His opinion is further supported by Claimant's testimony that his

vision was becoming worse since 1994, when he was “in his forties.”

Dr. Clark’s opinion that Claimant experienced a natural symptom of dramatic vision loss which coincidentally occurred after the alleged accident. Dr. Clark’s opinion that Claimant’s vision loss is unrelated to Claimant’s alleged injury is well-reasoned and persuasive. Consequently, I find the record does not support a finding that Claimant sustained vision loss due to a compensable accident.

Drs. Rittenhouse and Clark agreed Claimant’s headaches were likely unrelated to his vision loss. No contrary medical opinions were presented in the record. The opinions, which were offered by Claimant’s treating physician and ophthalmologist recently after an alleged injury, were well-reasoned and persuasive. Dr. Clark indicated Claimant might experience headaches performing work at close distances, and it is arguable Claimant’s work beneath a chassis constitutes work at close distances; however, no evidence was presented in the record establishing the distances at which Claimant works. Accordingly, I find Claimant’s headaches are unrelated to his vision loss.

Dr. Uribe offered a catalog of non-work-related causes for Claimant’s headaches, including Claimant’s allergic rhinitis, myopia, a family history of migraines, a congenital cranial vascular defect, diet and sleep apnea; however, he failed to establish which of the causes is responsible for Claimant’s condition. Claimant’s testimony that his headaches were reduced or resolved by the machine prescribed by Dr. Berrios for his sleep apnea buttresses Dr. Uribe’s opinion Claimant’s headaches could be caused by his sleep apnea. Dr. Uribe failed to relate Claimant’s sleep apnea to an alleged job injury, noting the condition is not generally related to trauma.

Dr. Griver’s treatment resulted in a normal MRI and MRA of Claimant’s brain in July 2002. His opinions and treatment were generally related to Claimant’s lumbar complaints, which are unrelated to the instant claim. Thereafter, Drs. De Vere and Likover questioned the occurrence of an injury, as noted above. Accordingly, there is no opinion of record establishing Claimant’s ongoing complaints of headaches were related to his job injury.

Claimant’s alleged cervical injury is equally unsupported in the record. Although Claimant reported a history of severe neck pain following his April 2001 injury to Dr. De Vere in September 2002, no such complaints were reported to Drs. Rittenhouse or Clark throughout their treatment of Claimant following his alleged

injury. Rather, Claimant treated chiefly for complaints of headaches.

Dr. Griver first reported any neck complaints on October 25, 2001, when Claimant complained of a stiff neck; however, he diagnosed headaches. Likewise, Dr. Uribe treated Claimant for ongoing headaches. Drs. Griver and Uribe reported no cervical abnormalities upon examination. Claimant's ongoing cervical complaints were not reported during continuing treatment by Dr. Griver, who began focusing solely on Claimant's back complaints. Dr. De Vere did not report ongoing cervical complaints as present complaints when he examined Claimant in September 2002. Due to the belated appearance of Claimant's fleeting cervical complaints, I find it exceedingly difficult to relate such complaints with an alleged injury in April 2001.

Moreover, I find Claimant's subjective complaint of cervical tenderness is without objective support in the record. Rather, as noted by Drs. De Vere and Likover, Claimant's motor strength and range of motion were normal upon physical examination. Likewise, his EEG, MRI and MRA scans of the head and brain were normal. Consequently, the record does not support a finding that Claimant suffers ongoing cervical symptoms from an alleged April 2001 job injury.

Although Claimant's back complaints are not the subject of the instant matter, it is noted that the three doctors who were questioned about Claimant's back complaints following the alleged injury unanimously agreed it would be "very difficult" to establish a relationship between Claimant's ongoing back complaints and his alleged job injury due to the length of time between his injury and complaints.

In light of the foregoing, I find Claimant, as the proponent of his position, failed to carry his burdens of production and persuasion in establishing the existence of a compensable injury. See Director, OWCP v. Greenwich Collieries, supra. Therefore, his claim is hereby **DENIED**.

D. Nature and Extent of Disability

Assuming **arguendo** that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The

permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

In the present matter, Claimant failed to establish he is unable to return to his regular or usual employment following his alleged injury. Claimant previously received more restrictive physical limitations from his physicians who treated and evaluated him for the 1994 back injury, yet returned to work full-time without limitations. Specifically, Dr. Scarpino restricted Claimant from lifting "not more than ten pounds," while Dr. Beaver allowed Claimant to lift "from twenty to fifty pounds" and intermittently perform various physical activities up to one hour per day.

Following the instant injury, Dr. Griver allowed Claimant to lift ten to twenty pounds without the alleged lumbar complaints that are not the subject of the instant claim. According to Dr. Griver, Claimant could intermittently perform the various physical activities identified by Dr. Beaver for up to two hours per day. Meanwhile, Dr. De Vere allowed Claimant to lift from "twenty to fifty pounds."

Despite Claimant's more restrictive physical limitations after his 1994 injury, he returned to full-time work with Flanagan and Employer as an M&R mechanic. Claimant asserts in his post-hearing brief that, after his 1994 injury, he capably returned to work for Employer at the heavy exertional level at which he was lifting more than fifty pounds. Claimant further argues Mr. Gordon acknowledged Claimant was "one of the best [workers] he ever had." Accordingly, Claimant established he could return to his prior work for Employer within his current restrictions by his own admission at the hearing and by his arguments in his post-hearing brief.

It is noted Claimant removed himself from the workforce before he visited Dr. Rittenhouse. Dr. Rittenhouse denied removing Claimant from work. Rather, he stated he would not automatically preclude a patient in Claimant's condition from work. Although Dr. Rittenhouse's office indicated on an insurance form that Claimant was unable to return to work until May 15, 2001, there is no evidence indicating Claimant was precluded from working by any physician prior to his visit with Dr. Rittenhouse.

It is also noted Claimant's testimony indicates many job opportunities are available to him because M&R mechanics are "always in demand." His testimony that he secured rather than removed his inventory of tools from Employer's yard arguably supports a conclusion Claimant may return for his tools to pursue his job opportunities as an M&R mechanic.

In light of the foregoing findings that Claimant failed to establish a presumption of compensability under Section 20(a) or

that he failed to establish an injury or disability assuming **arguendo** he established a **prima facie** case, the remaining issues raised by the parties have been rendered moot which pretermits further discussion.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since Claimant failed to establish a compensable injury under the Act.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's claim is hereby **DENIED**.

ORDERED this 5th day of August, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge